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CASES ADJUDGED

IN

THE SUPREME COURT

AT

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FRANK D. WAGNER

REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS

WILLIAM H. REHNQUIST, Chief Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
BYRON R. WHITE, Associate Justice.
THURGOOD MARSHALL, Associate Justice.
HARRY A. BLACKMUN, Associate Justice.
JOHN PAUL STEVENS, Associate Justice.
SANDRA DAY O'CONNOR, Associate Justice.
ANTONIN SCALIA, Associate Justice.
ANTHONY M. KENNEDY, Associate Justice.

RETIRED

WARREN E. BURGER, Chief Justice.
LEWIS F. POWELL, Jr., Associate Justice.

OFFICERS OF THE COURT

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KENNETH W. STARR, Solicitor General.
JOSEPH F. SPANIOL, Jr., Clerk.
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ALFRED WONG, Marshal.
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SUPREME COURT OF THE UNITED STATES

ALLOTMENT OF JUSTICES

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, effective February 18, 1988, viz.:

For the District of Columbia Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the First Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Second Circuit, THURGOOD MARSHALL, Associate Justice.

For the Third Circuit, WILLIAM J. BRENNAN, JR., Associate Justice.

For the Fourth Circuit, WILLIAM H. REHNQUIST, Chief Justice.

For the Fifth Circuit, BYRON R. WHITE, Associate Justice.

For the Sixth Circuit, ANTONIN SCALIA, Associate Justice.

For the Seventh Circuit, JOHN PAUL STEVENS, Associate Justice.

For the Eighth Circuit, HARRY A. BLACKMUN, Associate Justice.

For the Ninth Circuit, SANDRA DAY O'CONNOR, Associate Justice.

For the Tenth Circuit, BYRON R. WHITE, Associate Justice.

For the Eleventh Circuit, ANTHONY M. KENNEDY, Associate Justice.

For the Federal Circuit, WILLIAM H. REHNQUIST, Chief Justice.

February 18, 1988.

(For next previous allotment, and modifications, see 479 U. S., p. V, 483 U. S., pp. V, VI, and 484 U. S., pp. V, VI.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1989

PRESEAULT ET UX. *v.* INTERSTATE COMMERCE COMMISSION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 88–1076. Argued November 1, 1989—Decided February 21, 1990

Because pre-existing federal law failed to deal adequately with the national problem of shrinking rail trackage, Congress enacted the National Trails System Act Amendments of 1983 (Amendments) to the National Trails System Act (Trails Act), which authorize the Interstate Commerce Commission (ICC or Commission) to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails. Section 8(d) of this so-called "rails-to-trails" statute provides that a railroad wishing to cease operations along a particular route may negotiate with a State, municipality, or private group prepared to assume financial and managerial responsibility for the right-of-way. If the parties reach agreement, the land may, subject to ICC-imposed terms and conditions, be transferred to the trail operator for interim trail use notwithstanding whatever reversionary interests may exist in the property under state law. If no agreement is reached, the railroad may abandon the line entirely, thereby allowing the property to revert to abutting landowners if the terms of applicable easements and state law provide for such reversion. After Vermont Railway, Inc., stopped using a right-of-way adjacent to petitioners' land in Vermont, petitioners brought a state-court, quiet title action, alleging that the railroad's easement had been abandoned and thus extinguished, and that the right-of-way had therefore reverted to them under state law. Holding that it lacked jurisdiction because the ICC had not authorized abandonment of the route and therefore still exercised exclusive jurisdiction over it, the court dismissed the action, and the State Supreme Court affirmed. Petitioners then sought a certificate of abandonment from the ICC, but the Commission granted a petition to permit the railroad to discontinue rail service and transfer the right-of-way to the city of Burlington for interim trail use under § 8(d). The Federal Court of Appeals affirmed, rejecting petitioners' contentions that § 8(d) is unconstitutional on its face because it takes private property without just compensation in violation of the Fifth Amendment and because it is not a valid exercise of Congress' Commerce Clause power.

Held:

1. Even if the rails-to-trails statute gives rise to a taking, compensation is available under the Tucker Act, and the requirements of the Fifth Amendment are therefore satisfied. Since the Amendments and their legislative history do not mention the Tucker Act—which provides Claims Court jurisdiction over claims against the Government to recover damages founded on, *inter alia*, the Constitution—the Amendments do not exhibit the type of "unambiguous intention" to withdraw the Tucker Act remedy that is necessary to preclude a claim under that Act. See *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1019. Section 101 of the Amendments—which provides that "authority to . . . make payments . . . under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropriation Acts"—does not, as petitioners claim, indirectly manifest the necessary intent by rendering "unauthorized," as not approved by Congress for payment in advance, any rail-to-trail conversion that could result in Claims Court litigation. Since § 8(d) speaks in capacious terms of interim use of *any* right-of-way, it clearly authorizes conversions giving rise to just compensation claims and therefore does not support petitioners' contention. That there is no explicit promise to pay for any takings is irrelevant, since the Tucker Act constitutes an implied promise to pay just compensation which individual laws need not reiterate. Moreover, § 101 speaks only to payments under the Amendments themselves and not to takings claims that "arise" under the Fifth Amendment and for which payments are made "under" the Tucker Act from the separately appropriated Judgment Fund. Nor do statements in the legislative history indicating Congress' desire that the Amendments operate at "low cost" demonstrate an unambiguous intent to withdraw the Tucker Act remedy, since a generalized desire to protect the public fisc is insufficient for that purpose, see, *e. g.*, *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 127–128, and since the statements might simply reflect Congress' rejection of a more ambitious program of federally owned and managed trails. Because petitioners' failure to make use of the available Tucker Act remedy

renders their takings challenge to the ICC's order premature, there is no need to determine whether a taking occurred. Pp. 11–17.

2. The Amendments are a valid exercise of Congress' Commerce Clause power. The stated congressional purposes—(1) to encourage the development of additional recreational trails on an interim basis and (2) to preserve established railroad rights-of-way for future reactivation of rail service—are valid objectives to which the Amendments are reasonably adapted. Even if petitioners were correct that the rail banking purpose is a sham concealing a true purpose of preventing reversion of rights-of-way to property owners after abandonment, the Amendments would still be valid because they are reasonably adapted to the goal of encouraging the development of additional trails. There is no requirement that a law serve more than one legitimate purpose. Moreover, this Court is not free under the applicable rational-basis standard of review to hold the Amendments invalid simply because the rail banking purpose might be advanced more completely by measures more Draconian than § 8(d)—such as a program of mandatory conversions or a prohibition of *all* abandonments. The long history of congressional attempts to address the problem of rail abandonments provides sufficient reason to defer to the legislative judgment that § 8(d) is an appropriate answer. Furthermore, in light of that history, Congress was entitled to make the judgment that every line is a potentially valuable national asset meriting preservation even if no future rail use for it is currently foreseeable, so that the fact that the ICC must certify that public convenience and necessity permit abandonment before granting an interim trail use permit does not indicate that the statute fails to promote its purpose of preserving rail corridors. Pp. 17–19.

853 F. 2d 145, affirmed.

BRENNAN, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which SCALIA and KENNEDY, JJ., joined, *post*, p. 20.

Michael M. Berger argued the cause for petitioners. With him on the briefs were *Clarke A. Gravel*, *Richard E. Davis*, and *T. Christopher Greene*.

Brian J. Martin argued the cause for the federal respondents. With him on the brief were *Acting Solicitor General Bryson*, *Acting Assistant Attorney General Carr*, *Deputy Solicitor General Wallace*, *Anne S. Almy*, *James E. Brookshire*, *Robert S. Burk*, and *Ellen D. Hanson*. *John K. Dunleavy*, Assistant Attorney General, argued the cause for respondents State of Vermont et al. With him on the brief were *Jeffrey L. Amestoy*, Attorney General, and *John T. Leddy.**

JUSTICE BRENNAN delivered the opinion of the Court.

The question presented is the constitutionality of a federal "rails-to-trails" statute under which unused railroad rights-of-way are converted into recreational trails notwithstanding whatever reversionary property interests may exist under state law. Petitioners contend that the statute violates both the Fifth Amendment Takings Clause and the Commerce Clause, Art. I, §8. We find it unnecessary to evaluate the merits of the takings claim because we hold that even if the rails-to-trails statute gives rise to a taking, compensation is available to petitioners under the Tucker Act, 28 U. S. C.

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*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *John J. Rademacher* and *Richard L. Krause;* for the Missouri Farm Bureau Federation et al. by *Ron McMillin* and *Lori J. Levine;* for the National Association of Realtors by *Ralph W. Holmen;* and for the Pacific Legal Foundation et al. by *Ronald A. Zumbrun* and *Edward J. Connor, Jr.*

Briefs of *amici curiae* urging affirmance were filed for Montgomery County, Maryland, by *Fritz R. Kahn* and *Clyde H. Sorrell;* for the Iowa Association of County Conservation Boards et al. by *Charles H. Montange;* for the National Association of Counties et al. by *Benna Ruth Solomon, Joyce Holmes Benjamin, Beate Bloch, James L. Quarles III*, and *Jerold S. Kayden;* and for the Rails-to-Trails Conservancy et al. by *Robert Brager, David M. Friedland*, and *David Burwell.*

Briefs of *amici curiae* were filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *N. Gregory Taylor* and *Theodora P. Berger*, Assistant Attorneys General, *Dennis M. Eagan, Craig C. Thompson*, and *Terry T. Fujimoto*, Deputy Attorneys General, and by the Attorneys General for their respective States as follows: *Robert A. Butterworth* of Florida, *Thomas J. Miller* of Iowa, *Frederick J. Cowan* of Kentucky, *Frank J. Kelley* of Michigan, *Brian McKay* of Nevada, *Stephen E. Merrill* of New Hampshire, *Nicholas Spaeth* of North Dakota, *Anthony J. Celebrezze, Jr.*, of Ohio, *Ernest D. Preate, Jr.*, of Pennsylvania, *Roger A. Tellinghuisen* of South Dakota, *R. Paul Van Dam* of Utah, and *Charles G. Brown* of West Virginia; and for the National Association of Reversionary Property Owners by *Daryl A. Deutsch.*

§ 1491(a)(1) (1982 ed.), and the requirements of the Fifth Amendment are satisfied. We also hold that the statute is a valid exercise of congressional power under the Commerce Clause.

I

A

The statute at issue in this case, the National Trails System Act Amendments of 1983 (Amendments), Pub. L. 98–11, 97 Stat. 48, to the National Trails System Act (Trails Act), Pub. L. 90–543, 82 Stat. 919 (codified, as amended, at 16 U. S. C. § 1241 *et seq.*), is the culmination of congressional efforts to preserve shrinking rail trackage by converting unused rights-of-way to recreational trails.[1] In 1920, the Nation's railway system reached its peak of 272,000 miles; today only about 141,000 miles are in use, and experts predict that 3,000 miles will be abandoned every year through the end of this century.[2] Concerned about the loss of trackage, Congress included in the Railroad Revitalization and Regulatory Reform Act of 1976 (4–R Act), Pub. L. 94–210, 90 Stat. 144, as amended, 49 U. S. C. § 10906 (1982 ed.), several provisions aimed at promoting the conversion of abandoned[3] lines to trails. Section 809(a) of the 4–R Act required the Secretary of Transportation to prepare a report on alternative uses for abandoned railroad rights-of-way. Section 809(b) authorized the Secretary of the Interior to encourage conversion of abandoned rights-of-way to recreational and conservational uses through financial, educational, and technical assistance to local, state, and federal agencies. See note following 49 U. S. C. § 10906 (1982 ed.). Section 809(c) authorized the Interstate Commerce Commission (ICC or Commission) to delay the disposition of rail property for up to 180 days after the effective date of an order permitting abandonment, unless the property had first been offered for sale on reasonable terms for public purposes including recreational use. See 49 U. S. C. § 10906 (1982 ed.).

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[1] Many nature trails are operated directly by the Federal Government pursuant to the Trails Act, in which Congress reserved to itself the right to designate scenic and historic trails and delegated to the Secretary of the Interior and the Secretary of Agriculture authority to designate recreational trails and to develop and administer the entire trails system. See 16 U. S. C. §§ 1242–1246. Section 7(e) of the Trails Act, 16 U. S. C. § 1246(e), provides that the land necessary for a designated scenic or historic trail may be acquired by state or local governments or by federal authorities, either through cooperative agreements with landowners or by purchase. In the event that all voluntary means for acquiring the property fail, the appropriate Secretary is given limited power to obtain private lands through condemnation proceedings. See 16 U. S. C. § 1246(g).

[2] See authorities cited in Comment, Rails to Trails: Converting America's Abandoned Railroads Into Nature Trails, 22 Akron L. Rev. 645 (1989); see also 102 ICC Ann. Rep. 44–45 (1988); 101 ICC Ann. Rep. 37–38 (1987).

[3] There is an important distinction in the Interstate Commerce Act between "abandonment" of a rail line and "discontinuance" of service. See

By 1983, Congress recognized that these measures "ha[d] not been successful in establishing a process through which railroad rights-of-way which are not immediately necessary for active service can be utilized for trail purposes." H. R. Rep. No. 98–28, p. 8 (1983) (H. R. Rep.); S. Rep. No. 98–1, p. 9 (1983) (S. Rep.) (same). Congress enacted the Amendments to the Trails Act, which authorize the ICC to preserve for possible future railroad use rights-of-way not currently in service and to allow interim use of the land as recreational trails. Section 8(d) provides that a railroad wishing to cease operations along a particular route may negotiate with a State, municipality, or private group that is prepared to as-

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49 U. S. C. § 10903 (1982 ed.). Once a carrier "abandons" a rail line pursuant to authority granted by the Interstate Commerce Commission, the line is no longer part of the national transportation system, and although the Commission is empowered to impose conditions on abandonments, see, *e. g.*, 49 U. S. C. §§ 10905(f)(4), 10906 (1982 ed.), as a general proposition ICC jurisdiction terminates. See *Hayfield Northern R. Co.* v. *Chicago & North Western Transp. Co.*, 467 U. S. 622, 633–634 (1984); 54 Fed. Reg. 8011–8012 (1989). In contrast, "discontinuance" authority allows a railroad to cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service in the future.

sume financial and managerial responsibility for the right-of-way.[4] If the parties reach agreement, the land may be transferred to the trail operator for interim trail use, subject to ICC-imposed terms and conditions; if no agreement is reached, the railroad may abandon the line entirely and liquidate its interest.[5]

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[4] Section 8(d), codified at 16 U. S. C. § 1247(d), provides:

"The Secretary of Transportation, the Chairman of the Interstate Commerce Commission, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976, shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter [the Trails Act], if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Commission shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use."

[5] Under implementing regulations promulgated by the ICC, a railroad may apply to the ICC for either a Certificate of Interim Trail Use or Abandonment (CITU) or, in a proceeding involving the exemption of a route from ICC regulation, a Notice of Interim Trail Use or Abandonment (NITU). See *Rail Abandonments—Use of Rights-of-Way as Trails,* 2 I. C. C. 2d 591, 628 (1986); 49 CFR § 1152.29 (1988). A CITU or NITU provides a 180-day period during which the railroad may discontinue service, cancel tariffs, and salvage track and other equipment, and also negotiate a voluntary agreement for interim trail use with a qualified trail operator. If agreement is reached, interim trail use is thereby authorized. If not, the CITU or NITU automatically converts into an effective certifi-

Section 8(d) of the amended Trails Act provides that interim trail use "shall not be treated, for any purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U. S. C. § 1247(d). This language gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations. State law generally governs the disposition of reversionary interests, subject of course to the ICC's "exclusive and plenary" jurisdiction to regulate abandonments, *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 321 (1981), and to impose conditions affecting postabandonment use of the property. See *Hayfield Northern R. Co.* v. *Chicago & North Western Transp. Co.*, 467 U. S. 622, 633 (1984). By deeming interim trail use to be like discontinuance rather than abandonment, see n. 3, *supra*, Congress prevented property interests from reverting under state law:

> "The key finding of this amendment is that interim use of a railroad right-of-way for trail use, when the route itself remains intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for railroad purposes. This finding alone should eliminate many of the problems with this program. The concept of attempting to establish trails only after the formal abandonment of a railroad right-of-way is self-defeating; once a right-of-way is abandoned for railroad purposes there may be nothing left for trail use. This amendment would ensure that potential interim trail use will be considered prior to abandonment." H. R. Rep., at 8–9.

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cate or notice of abandonment. Because the ICC had not yet promulgated its final regulations implementing § 8(d) at the time of its decision in the instant case, the Commission did not issue a CITU or NITU.

See S. Rep., at 9 (same). The primary issue in this case is whether Congress has violated the Fifth Amendment by precluding reversion of state property interests.

B

Petitioners claim a reversionary interest in a railroad right-of-way adjacent to their land in Vermont. In 1962, the State of Vermont acquired the Rutland Railway Corporation's interest in the right-of-way and then leased the right-of-way to Vermont Railway, Inc. Vermont Railway stopped using the route more than a decade ago and has since removed all railroad equipment, including switches, bridges, and track, from the portion of the right-of-way claimed by petitioners. In 1981, petitioners brought a quiet title action in the Superior Court of Chittenden County, alleging that the easement had been abandoned and was thus extinguished, and that the right-of-way had reverted to them by operation of state property law. In August 1983, the Superior Court dismissed the action, holding that it lacked jurisdiction because the ICC had not authorized abandonment of the route and therefore still exercised exclusive jurisdiction over it. The Vermont Supreme Court affirmed. *Trustees of Diocese of Vermont* v. *State*, 145 Vt. 510, 496 A. 2d 151 (1985).

Petitioners then sought a certificate of abandonment of the rail line from the ICC. The State of Vermont intervened, claiming title in fee simple to the right-of-way and arguing in the alternative that, even if the State's interest were an easement, the land could not revert while it was still being used for a public purpose. Vermont Railway and the State then petitioned the ICC to permit the railroad to discontinue rail service and transfer the right-of-way to the city of Burlington for interim use as a public trail under § 8(d) of the Trails Act. By a Notice of Exemption decided January 2, 1986, the ICC allowed the railroad to discontinue service and approved the agreement between the State and the city for interim trail use. See 51 Fed. Reg. 454–455. On February 4, 1986, the

ICC Chairman denied petitioners' application for a stay pending administrative review,[6] and the decision became effective on February 5, 1986. Petitioners' motion for reconsideration and/or clarification was denied on July 17, 1987. The Commission noted that "[i]nevitably, interim trail use will conflict with the reversionary rights of adjacent land owners, but that is the very purpose of the Trails Act." *State of Vermont & Vermont Railway, Inc.—Discontinuance of Service Exemption in Chittenden County*, 3 I. C. C. 2d 903, 908.

Petitioners sought review of the ICC's order in the Court of Appeals for the Second Circuit, arguing that § 8(d) of the Trails Act is unconstitutional on its face because it takes private property without just compensation and because it is not a valid exercise of Congress' Commerce Clause power. The Court of Appeals rejected both arguments. 853 F. 2d 145 (1988). It reasoned that the ICC has "plenary and exclusive authority" over abandonments, *id.*, at 151, and that federal law must be considered in determining the property right held by petitioners. "For as long as it determines that the land will serve a 'railroad purpose,' the ICC retains jurisdiction over railroad rights-of-way; it does not matter whether that purpose is immediate or in the future." *Ibid.* Because the court believed that no reversionary interest could vest until the ICC determined that abandonment was appropriate, the court concluded that the Trails Act did not result in a taking. Next, the court found that the Trails Act was reasonably adapted to two legitimate congressional purposes under the Commerce Clause: "preserving rail corridors for future railroad use" and "permitting public recreational use of trails." *Id.*, at 150. The Court of Appeals therefore dismissed petitioners' Commerce Clause challenge. We granted certiorari. 490 U. S. 1034 (1989).

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[6] *State of Vermont and Vermont Railway, Inc.—Discontinuance of Service Exemption in Chittenden County*, Docket No. AB–265 (Sub–No. 1X).

II

The Fifth Amendment provides in relevant part that "private property [shall not] be taken for public use, without just compensation." The Amendment "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314 (1987). It is designed "not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *Id.*, at 315 (emphasis in original). Furthermore, the Fifth Amendment does not require that just compensation be paid in advance of or even contemporaneously with the taking. See *Williamson County Regional Planning Comm'n* v. *Hamilton Bank of Johnson City*, 473 U. S. 172, 194 (1985). All that is required is the existence of a "'reasonable, certain and adequate provision for obtaining compensation'" at the time of the taking. *Regional Rail Reorganization Act Cases*, 419 U. S. 102, 124–125 (1974) (quoting *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641, 659 (1890)). "If the government has provided an adequate process for obtaining compensation, and if resort to that process 'yield[s] just compensation,' then the property owner 'has no claim against the Government' for a taking." *Williamson County Regional Planning Comm'n, supra,* at 194–195 (quoting *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1013, 1018, n. 21 (1984)).

For this reason, "taking claims against the Federal Government are premature until the property owner has availed itself of the process provided by the Tucker Act." *Williamson County Regional Planning Comm'n, supra,* at 195; see also *United States* v. *Riverside Bayview Homes, Inc.*, 474 U. S. 121, 127–128 (1985); *Monsanto, supra,* at 1016; *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U. S. 59, 94, n. 39 (1978). The Tucker Act provides jurisdiction in the United States Claims Court for any claim against the Federal Government to recover damages founded on the Constitution, a statute, a regulation, or an express or implied-in-fact contract. See 28 U. S. C. § 1491(a)(1) (1982 ed.); see also § 1346(a)(2) (Little Tucker Act, which creates concurrent jurisdiction in the district courts for such claims not exceeding $10,000 in amount). "If there is a taking, the claim is 'founded upon the Constitution' and within the jurisdiction of the [Claims Court] to hear and determine." *United States* v. *Causby*, 328 U. S. 256, 267 (1946).

The critical question in this case, therefore, is whether a Tucker Act remedy is available for claims arising out of takings pursuant to the Amendments. The proper inquiry is not whether the statute "expresses an affirmative showing of congressional intent to permit recourse to a Tucker Act remedy," but rather "whether Congress has in the [statute] *withdrawn* the Tucker Act grant of jurisdiction to the [Claims Court] to hear a suit involving the [statute] 'founded . . . upon the Constitution.'" *Regional Rail Reorganization Act Cases*, *supra*, at 126 (emphasis in original). Under this standard, we conclude that the Amendments did not withdraw the Tucker Act remedy. Congress did not exhibit the type of "unambiguous intention to withdraw the Tucker Act remedy," *Monsanto*, *supra*, at 1019, that is necessary to preclude a Tucker Act claim. See *Glosemeyer* v. *Missouri-Kansas-Texas R. Co.*, 685 F. Supp. 1108, 1120–1121 (ED Mo. 1988), aff'd, 879 F. 2d 316, 324–325 (CA8 1989).

Neither the statute nor its legislative history mentions the Tucker Act. As indirect evidence of Congress' intent to prevent recourse to the Tucker Act, petitioners point to § 101 of the Amendments which, although it was not codified into law, provides in relevant part that:

> "Notwithstanding any other provision of this Act, authority to enter into contracts, and to make payments, under this Act shall be effective only to such extent or in such amounts as are provided in advance in appropria-

tion Acts." 97 Stat. 42, note following 16 U. S. C. § 1249.

Petitioners contend that this section limits the ICC's authority for conversions to those not requiring the expenditure of any funds and to those others for which funds had been appropriated in advance. Thus, any conversion that could result in Claims Court litigation was not authorized by Congress, since payment for such an acquisition would not have been approved by Congress in advance. Petitioners insist that such *unauthorized* Government actions cannot create Tucker Act liability, citing *Hooe* v. *United States*, 218 U. S. 322, 335 (1910), and *Regional Rail Reorganization Act Cases*, *supra*, at 127, n. 16.

We need not decide what types of official authorization, if any, are necessary to create federal liability under the Fifth Amendment, because we find that rail-to-trail conversions giving rise to just compensation claims are clearly authorized by § 8(d). That section speaks in capacious terms of "interim use of *any* established railroad rights-of-way" (emphasis added) and does not support petitioners' proposed distinction between conversions that might result in a taking and those that do not. Although Congress did not explicitly promise to pay for any takings, we have always assumed that the Tucker Act is an "implie[d] promis[e]" to pay just compensation which individual laws need not reiterate. *Yearsley* v. *W. A. Ross Construction Co.*, 309 U. S. 18, 21 (1940). Petitioners' argument that specific congressional authorization is required for those conversions that might result in takings is a thinly veiled attempt to circumvent the established method for determining whether Tucker Act relief is available for claims arising out of takings pursuant to a federal statute. We reaffirm that a Tucker Act remedy exists unless there are unambiguous indications to the contrary.

Section 101, moreover, speaks only to appropriations under the Amendments themselves and not to relief available under the Tucker Act, as evidenced by § 101's opening clause—"[n]otwithstanding any other provision of *this* Act" (emphasis added)—which refers to the 1983 Amendments. The section means simply that payments made pursuant to the Amendments, such as funding for scenic trails, markers, and similar purposes, see Amendments § 209(5)(C), 97 Stat. 49 (codified at 16 U. S. C. § 1249(c)(2)) (authorizing appropriations for the development and administration of certain National Scenic and National Historic Trails), are effective only "in such amounts as are provided in advance in appropriation Acts," a concept that mirrors Art. I, § 9, of the Constitution ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"). Payments for takings claims are not affected by this language, because such claims "arise" under the Fifth Amendment, see *First English Evangelical Lutheran Church*, 482 U. S., at 315–316. Payments for takings would be made "under" the Tucker Act, not the Trails Act, and would be drawn from the Judgment Fund, which is a separate appropriated account, see 31 U. S. C. § 1304(a) (1982 ed.). Section 101 does not manifest the type of clear and unmistakable congressional intent necessary to withdraw Tucker Act coverage.

Petitioners next assert that Congress' desire that the Amendments operate at "low cost," H. R. Rep., at 3, somehow indicates that Congress withdrew the Tucker Act remedy. There is no doubt that Congress meant to keep the costs of the Amendments to a minimum.[7] This intent, however, has little bearing on the Tucker Act question. We have previously rejected the argument that a generalized desire to protect the public fisc is sufficient to withdraw relief under the Tucker Act. In the *Regional Rail Reorganization Act Cases*, we recognized that the Rail Act established "[m]aximum" funding authorizations, 419 U. S., at 127–128, but we nevertheless held that those limits were not an unambiguous repeal of the Tucker Act remedy. We reasoned that the maximum limits might "support the inference that Congress was so convinced that the huge sums provided would surely equal or exceed the required constitutional minimum that it never focused upon the possible need for a suit in the Court of Claims." *Id.*, at 128. In *Monsanto*, we stated that:

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[7] See H. R. Rep., at 2 (noting that the Committee "eliminated most of the items which could require future Federal expenditures"); S. Rep., at 3 (same); H. R. Rep., at 11 (reporting required funding for the bill to be "insignificant"); 129 Cong. Rec. 5219 (1983) (remarks of floor manager Rep. Seiberling) ("[T]he committee recommended a revised text which eliminated most of the items which would require future Federal expenditures. . . . Additional recommendations reflect continuing efforts to encourage the expansion of trail recreation opportunities across the Nation at a low cost").

> "Congress in [the statute] did not address the liability of the Government to pay just compensation should a taking occur. Congress' failure specifically to mention or provide for recourse against the Government may reflect a congressional belief that use of data by [the Government] in the ways authorized by [the statute] effects no Fifth Amendment taking or it may reflect Congress' assumption that the general grant of jurisdiction under the Tucker Act would provide the necessary remedy for any taking that may occur. In any event, the failure cannot be construed to reflect an unambiguous intention to withdraw the Tucker Act remedy." 467 U. S., at 1018–1019.

Similar logic applies to the instant case. The statements made in Congress during the passage of the Trails Act Amendments might reflect merely the decision not to create a program of direct federal purchase,[8] construction, and maintenance of trails, and instead to allow state and local governments and private groups to establish and manage trails. The alternative chosen by Congress is less costly than a program of direct federal trail acquisition because, under any view of takings law, only some rail-to-trail conversions will amount to takings. Some rights-of-way are held in fee simple. See *National Wildlife Federation* v. *ICC*, 271 U. S. App. D. C. 1, 10, 850 F. 2d 694, 703 (1988). Others are held as easements that do not even as a matter of state law revert upon interim use as nature trails.[9] In addition, under § 8(d) the Federal Government neither incurs the costs of constructing and maintaining the trails nor assumes legal liability for the transfer or use of the right-of-way. In contrast, the costs of acquiring and administering national scenic and national historic trails are borne directly by the Federal Government. See n. 1, *supra*. Thus, the "low cost" language might reflect Congress' rejection of a more ambitious program of federally owned and managed trails, rather than withdrawal of a Tucker Act remedy. The language does not amount to the "unambiguous intention" required by our prior cases.[10]

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[8] We note that the ICC has construed § 8(d) as not providing federal power to condemn railroad rights-of-way for interim trail use. See *Rail Abandonments*, 2 I. C. C. 2d, at 596–598; see also *National Wildlife Federation* v. *ICC*, 271 U. S. App. D. C. 1, 4, n. 4, 6–9, 850 F. 2d. 694, 697, n. 4, 699–702 (1988); *Connecticut Trust for Historic Preservation* v. *ICC*,

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841 F. 2d 479, 482–483 (CA2 1988); *Washington State Dept. of Game* v. *ICC*, 829 F. 2d 877, 879–882 (CA9 1987).

[9] Some state courts have held that trail use does not constitute abandonment of a right-of-way for public travel so as to trigger reversionary rights. See *State by Washington Wildlife Preservation, Inc.* v. *State*, 329 N. W. 2d 543, 545–548 (Minn.), cert. denied, 463 U. S. 1209 (1983); *Reiger* v. *Penn Central Corp.*, No. 85–CA–11 (Ct. App. Greene County, Ohio, May 21, 1985).

[10] Petitioners also claim that a floor statement by Senator Domenici that "the Federal Government has acquired too much land from landowners using condemnation procedures that in essence short changed the property rights of the landowners," 129 Cong. Rec. 1607 (1983), means that Tucker Act relief is unavailable. We disagree. The Senator spoke in the context of praising the statute for "encourag[ing] cooperation" rather than resorting automatically to condemnation. *Ibid.* As administered by the ICC, the conversion process begins when a railroad *voluntarily* seeks a CITU or NITU; it then negotiates with a qualified trail operator to establish interim

In sum, petitioners' failure to make use of the available Tucker Act remedy renders their takings challenge to the ICC's order premature. We need not decide whether a taking occurred in this case.

III

Petitioners also contend that the Amendments are not a valid exercise of congressional power under the Commerce Clause, Art. I, § 8, because the true purpose of § 8(d) is to prevent reversion of railroad rights-of-way to property owners after abandonment and to create recreational trails, rather than to preserve rail corridors for future railroad use. We evaluate this claim under the traditional rationality standard of review: we must defer to a congressional finding that a regulated activity affects interstate commerce "if there is any rational basis for such a finding," *Hodel* v. *Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U. S. 264, 276 (1981), and we must ensure only that the means selected by Congress are "'reasonably adapted to the end permitted by the Constitution.'" *Ibid.* (quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 262 (1964)); see also *Hodel* v. *Indiana*, 452 U. S. 314, 323–324 (1981). The Amendments clearly pass muster.

Two congressional purposes are evident. First, Congress intended to "encourage the development of additional trails" and to "assist recreation[al] users by providing opportunities for trail use on an interim basis." H. R. Rep., at 8, 9; S. Rep., at 9, 10 (same); see also 16 U. S. C. § 1241(a) (Trails Act "promote[s] the preservation of, public access to, travel within, and enjoyment and appreciation of the open-air, out-

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trail use. The ICC does not set up trails on its own and has interpreted § 8(d) to exclude the type of condemnation power vested in the Secretaries of the Interior and Agriculture by 16 U. S. C. § 1246(g). See n. 8, *supra*. This limitation on ICC condemnation authority is not relevant to the question whether compensation under the Tucker Act is available for takings resulting from the conversions that do occur, and it certainly is not an unambiguous sign that Congress meant to withdraw Tucker Act relief.

door areas and historic resources of the Nation"). Second, Congress intended "to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." H. R. Rep., at 8; S. Rep., at 9; see also 16 U. S. C. § 1247(d). These are valid congressional objectives to which the Amendments are reasonably adapted.

Petitioners contend that the Amendments do not reasonably promote the latter purpose because the ICC cannot authorize trail use until it has found that the right-of-way at issue is not necessary for "present *or future* public convenience and necessity." 49 U. S. C. § 10903(a) (1982 ed.) (emphasis added). The ICC has explained that:

> "In every Trails Act case, we will already have found that the public convenience and necessity permit abandonment (or that regulatory approval is not required under 49 U. S. C. [§]10505)." 54 Fed. Reg. 8012, n. 3 (1989).

Thus, trail conversion is permitted only *after* the Commission determines that rail service will not be not needed in the foreseeable future. This, according to petitioners, reveals that the rail banking rationale is a sham. If Congress really wished to address the problem of shrinking trackage, it would not have left conversions to voluntary agreements between railroads and state and local agencies or private groups. Rather, petitioners suggest, Congress would have created a mandatory program administered directly by the ICC.

We note at the outset that even under petitioners' reading, the Amendments would still be a valid exercise of congressional power under the Commerce Clause because they are reasonably adapted to the goal of encouraging the development of additional recreational trails. There is no requirement that a law serve more than one legitimate purpose. Moreover, we are not at liberty under the rational basis standard of review to hold the Amendments invalid merely because more Draconian measures—such as a program of mandatory conversions or a prohibition of *all* abandonments—might advance more completely the rail banking purpose. The process of legislating often involves tradeoffs, compromises, and imperfect solutions, and our ability to imagine ways of redesigning the statute to advance one of Congress' ends does not render it irrational. See, *e. g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U. S. 456, 469 (1981). The history of congressional attempts to address the problem of rail abandonments, see *supra*, at 5–6, provides sufficient reason to defer to the legislative judgment that § 8(d) is an appropriate answer. Here, as in *Virginia Surface Mining & Reclamation Assn., Inc.*, "Congress considered the effectiveness of existing legislation and concluded that additional measures were necessary." 452 U. S., at 283.

Petitioners' argument that § 8(d) does not serve the rail banking purpose, moreover, is not well taken. That the ICC must certify that public convenience and necessity permit abandonment before granting a CITU or NITU does not indicate that the statute fails to promote its purpose of preserving rail corridors. Congress did not distinguish between short-term and long-term rail banking, nor did it require that the Commission develop a specific contingency plan for reactivation of a line before permitting conversion. To the contrary, Congress apparently believed that every line is a potentially valuable national asset that merits preservation even if no future rail use for it is currently foreseeable. Given the long tradition of congressional regulation of railroad abandonments, see, *e. g.*, *Colorado* v. *United States*, 271 U. S. 153 (1926), that is a judgment that Congress is entitled to make.

IV

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA and JUSTICE KENNEDY join, concurring.

Petitioners assert that the actions of the Interstate Commerce Commission (ICC or Commission) prevent them from enjoying property rights secured by Vermont law and thereby have effected a compensable taking. The Court of Appeals for the Second Circuit determined that, no matter what Vermont law might provide, the ICC's actions forestalled petitioners from possessing the asserted reversionary interest, and thus that no takings claim could arise. Today the Court affirms the Second Circuit's judgment on quite different grounds. I join the Court's opinion, but write separately to express my view that state law determines what property interest petitioners possess and that traditional takings doctrine will determine whether the Government must compensate petitioners for the burden imposed on any property interest they possess.

As the Court acknowledges, *ante*, at 8–9, 15–16, state law creates and defines the scope of the reversionary or other real property interests affected by the ICC's actions pursuant to § 208 of the National Trails System Act Amendments of 1983, 16 U. S. C. § 1247(d). In determining whether a taking has occurred, "we are mindful of the basic axiom that '[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.'" *Ruckelshaus* v. *Monsanto Co.*, 467 U. S. 986, 1001 (1984), quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S. 155, 161 (1980) (internal quotation omitted). Although original federal grants of railway easements may influence certain disputes over interests in land, see *Great Northern R. Co.* v. *United States*, 315 U. S. 262 (1942); *Idaho* v. *Oregon Short Line R. Co.*, 617 F. Supp. 207 (Idaho 1985), no such federal role is present in this case. Rather, the parties sharply dispute what interest, according to Vermont law, the State of

Vermont acquired from the Rutland Railway Corporation and, correspondingly, whether petitioners possess the property interest that they claim has been taken. See Brief for Petitioners 15, and n. 14; Brief for Respondents State of Vermont et al. 22–25; Reply Brief for Petitioners 2–4. Similar reference to state law has guided other courts seeking to determine whether a railway right of way lapsed upon the conversion to trail use. Compare *State by Washington Wildlife Preservation, Inc.* v. *State*, 329 N. W. 2d 543, 545–548 (Minn.) (trail use within original interest, thus reversionary rights have not matured), cert. denied, 463 U. S. 1209 (1983), with *Lawson* v. *State*, 107 Wash. 2d 444, 730 P. 2d 1308 (1986) (change in use would give effect to reversionary interests); *McKinley* v. *Waterloo R. Co.*, 368 N. W. 2d 131, 133–136 (Iowa 1985) (lack of railway use triggered period leading to reversion); *Schnabel* v. *County of DuPage*, 101 Ill. App. 3d 553, 428 N. E. 2d 671 (1981) (easement lapsed). Determining what interest petitioners would have enjoyed under Vermont law, in the absence of the ICC's recent actions, will establish whether petitioners possess the predicate property interest that must underlie any takings claim. See *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 1001–1004. We do not attempt to resolve that issue.

It is also clear that the Interstate Commerce Act, and the ICC's actions pursuant to it, pre-empt the operation and effect of certain state laws that "conflict with or interfere with federal authority over the same activity." *Chicago & North Western Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U. S. 311, 319 (1981); see *id.*, at 318–319. States may not impose obligations upon carriers at odds with those governed through the ICC's "exclusive" and "plenary authority to regulate . . . rail carriers' cessations of service on their lines." *Id.*, at 323; see *id.*, at 324–327. A State may again exercise its regulatory powers once the ICC authorizes a carrier's abandonment of service, and, thus, unless the Commission attaches postabandonment conditions to the abandonment certificate, "brings [the Commission's] regulatory mission to an end." *Hayfield Northern R. Co.* v. *Chicago & North Western Transp. Co.*, 467 U. S. 622, 633 (1984). As the Vermont Supreme Court recognized, state courts cannot enforce or give effect to asserted reversionary interests when enforcement would interfere with the Commission's administration of the Interstate Commerce Act. See *Trustees of Diocese of Vermont* v. *State*, 145 Vt. 510, 496 A. 2d 151 (1985). These results are simply routine and well-established consequences of the Supremacy Clause, U. S. Const., Art. VI, cl. 2.

The scope of the Commission's authority to regulate abandonments, thereby delimiting the ambit of federal power, is an issue quite distinct from whether the Commission's exercise of power over matters within its jurisdiction effected a taking of petitioners' property. Cf. *Kaiser Aetna* v. *United States*, 444 U. S. 164, 174 (1979) ("[T]here is no question but that Congress could assure the public a free right of access . . . . Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question"). Although the Commission's actions may pre-empt the operation and effect of certain state laws, those actions do not displace state law as the traditional source of the real property interests. See *Ruckelshaus* v. *Monsanto Co.*, *supra*, at 1003–1004, 1012 (state law creates property right in trade secrets for purposes of Fifth Amendment, and regulatory regime does not pre-empt state property law). The Commission's actions may delay property owners' enjoyment of their reversionary interests, but that delay burdens and defeats the property interest rather than suspends or defers the vesting of those property rights. See *National Wildlife Federation* v. *ICC*, 271 U. S. App. D. C. 1, 11–12, and n. 16, 850 F. 2d 694, 704–705, and n. 16 (1988). Any other conclusion would convert the ICC's power to pre-empt conflicting state regulation of interstate commerce into the power to pre-empt the rights guaranteed by state property law, a result incompatible with the Fifth Amendment. See *Ruckels-*

haus v. *Monsanto Co.*, 467 U. S., at 1012 ("If Congress can 'pre-empt' state property law in the manner advocated by EPA, then the Taking Clause has lost all vitality. [A] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation . . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent'"), quoting *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U. S., at 164.

The Court of Appeals for the Second Circuit adopted just this unjustified interpretation of the effect of the ICC's exercise of federal power. The court concluded that even if petitioners held the reversionary interest they claim, no taking occurred because "no reversionary interest can or would vest" until the ICC determines that abandonment is appropriate. See 853 F. 2d 145, 151 (1988). This view conflates the scope of the ICC's power with the existence of a compensable taking and threatens to read the Just Compensation Clause out of the Constitution. The ICC may possess the power to postpone enjoyment of reversionary interests, but the Fifth Amendment and well-established doctrine indicate that in certain circumstances the Government must compensate owners of those property interests when it exercises that power. See *First English Evangelical Lutheran Church of Glendale* v. *County of Los Angeles*, 482 U. S. 304, 314–315 (1987) (The Taking Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power," and the Clause "is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking"). Nothing in the Court's opinion disavows these principles. The Court's conclusion that § 8(d) authorizes rails-to-trails conversions that amount to takings, *ante*, at 13, and its conclusion that "under any view of takings law, only some rail-to-trail conversions will amount to takings," *ante*, at 16, are inconsistent with the Second Circuit's view. Indeed, if the Second Circuit's approach were adopted, discussion of the availability of the Tucker Act remedy would be unnecessary. Even the federal respondents acknowledge that the existence of a taking will rest upon the nature of the state-created property interest that petitioners would have enjoyed absent the federal action and upon the extent that the federal action burdened that interest. See Brief for Federal Respondents 23–24.

Well-established principles will govern analysis of whether the burden the ICC's actions impose upon state-defined real property interests amounts to a compensable taking. We recently concluded in *Nollan* v. *California Coastal Comm'n*, 483 U. S. 825, 831–832 (1987), that a taking would occur if the Government appropriated a public easement. See also *Kaiser Aetna*, *supra*, at 179–180 ("[T]he 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation") (footnote omitted). In such a case, a "permanent physical occupation" of the underlying property "has occurred . . . where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Nollan*, *supra*, at 832; see also, *Kaiser Aetna*, *supra*, at 180 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation"). The Government's appropriation of other, lesser servitudes may also impose a burden requiring payment of just compensation. See *United States* v. *Causby*, 328 U. S. 256 (1946); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U. S. 327 (1922). And the Court recently concluded that the Government's burdening of property for a distinct period, short of a permanent taking, may nevertheless mandate compensation. See *First English Evangelical Lutheran Church*, *supra*, at 318–319. Of course, a party may gain the benefit of these principles only after establishing possession of a property interest that has been burdened. As today's decision indicates, petitioners and persons similarly situated will have ample opportunity to make that showing.

With this understanding, and for the reasons set forth in the Court's opinion, I agree that the judgment below should be affirmed.

DOLE, SECRETARY OF LABOR, ET AL. *v.* UNITED STEELWORKERS OF AMERICA ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88–1434. Argued November 6, 1989—Decided February 21, 1990

Pursuant to the Occupational Safety and Health Act of 1970, the Department of Labor (DOL) promulgated a hazard communication standard, which imposed disclosure requirements on manufacturers aimed at ensuring that their employees were informed of the potential hazards posed by chemicals in the workplace. Among other things, the standard required the manufacturers to label hazardous chemical containers, conduct training on the chemicals' dangers, and make available to employees safety data sheets on the chemicals. Respondents and others challenged the standard in the Court of Appeals. The court held that the Occupational Safety and Health Administration (OSHA) had not adequately explained why the standard was limited to the manufacturing sector and twice directed OSHA either to apply it to workplaces in other sectors of the economy or to state why such application would be infeasible. Ultimately, DOL issued a revised standard that applied to worksites in all sectors and submitted it to the Office of Management and Budget (OMB) for review under the Paperwork Reduction Act of 1980 (Act). That Act sets forth a comprehensive scheme to reduce the federal paperwork burden on the public by requiring, *inter alia,* an agency to submit any instrument for the "collection of information"—termed an "information collection request"—to the OMB for approval before it may collect the information. OMB disapproved three of the standard's provisions on the ground that their requirements were not necessary to protect employees, and DOL published notice withdrawing the provisions. Respondents sought further relief from the Court of Appeals, which ordered DOL to reinstate the disapproved provisions. The court reasoned that the provisions represented good-faith compliance by DOL with the court's prior orders, that OMB lacked the authority under the Act to disapprove the provisions, and that, therefore, DOL had no legitimate basis for withdrawing them.

Held: The Act does not authorize OMB to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties. Pp. 32–43.

(a) The Act's language indicates that the terms "information collection request" and "collection of information"—which is defined as "the obtaining or soliciting of facts by an agency through . . . reporting or recordkeeping requirements"—refer solely to the collection of information by, or for the use of, a federal agency, rather than to disclosure rules, which do not result in information being made available for agency use. Petitioners' interpretation of the above definition—that an agency is "soliciting facts" when it requires someone to communicate specified data to a third party and that rules requiring labeling, employee training, and the keeping of accessible data sheets are "reporting and recordkeeping requirements"—is precluded by the language, purpose, and structure of the Act as a whole. Pp. 34–35.

(b) Under the traditional canon of construction requiring that words grouped in a list be given a related meaning, the phrase "reporting and recordkeeping requirements" would comprise only rules requiring information to be sent or made available to a federal agency, not disclosure rules, since the other examples listed are forms for communicating information to a party requesting that information. P. 36.

(c) Moreover, disclosure rules present none of the problems Congress sought to solve, and none of the enumerated purposes would be served by subjecting such rules to the Act's provisions. Pp. 36–38.

(d) That Congress did not intend the Act to encompass disclosure rules is further revealed by the language and import of other provisions. The internal preliminary steps that an agency must take before adopting an information collection request affect agencies only when they gather information for their own use and do not relate to disclosure rules. Likewise, the provisions governing OMB's review of proposed agency information collection requests focus on an agency's ability to use the information, particularly its ability to process it. The Act does not authorize OMB to determine the usefulness of agency-adopted warning requirements to those being warned. Furthermore, the Act's enforcement mechanism by its terms does not apply to disclosure rules, and its clear legislative history shows that Congress intended the provision to apply to all collections of information subject to the Act. Pp. 38–40.

(e) The Act's legislative history does not support petitioners' contention that Congress intended "collection of information" to include disclosure rules. This Court need not defer to OMB's contrary interpretation where Congress' intent is clear. Pp. 40–41.

855 F. 2d 108, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. WHITE, J., filed a dissenting opinion, in which REHNQUIST, C. J., joined, *post*, p. 43.

Jeffrey P. Minear argued the cause for petitioners. With him on the briefs were *Acting Solicitor General Wallace*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Merrill*, *Leonard Schaitman*, and *Marleigh D. Dover*.

Laurence Gold argued the cause for respondents. With him on the brief for respondents United Steelworkers of America et al. were *George H. Cohen*, *Jeremiah A. Collins*, *David C. Vladeck*, *Alan B. Morrison*, and *Elihu I. Leifer*. *Maurice Baskin* filed a brief for respondents Associated Builders and Contractors, Inc., et al.*

JUSTICE BRENNAN delivered the opinion of the Court.

Among the regulatory tools available to Government agencies charged with protecting public health and safety are rules which require regulated entities to disclose information directly to employees, consumers, or others. Disclosure rules protect by providing access to information about what dangers exist and how these dangers can be avoided. Today we decide whether the Office of Management and Budget (OMB) has the authority under the Paperwork Reduction Act of 1980, 44 U. S. C. §3501 *et seq.* (1982 ed. and Supp. V), to review such regulations.

I

In 1983, pursuant to the Occupational Safety and Health Act of 1970 (OSH Act), 84 Stat. 1590, 29 U. S. C. §651 *et seq.* (1982 ed.), which authorizes the Department of Labor (DOL) to set health and safety standards for workplaces, DOL

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*Briefs of *amici curiae* urging reversal were filed for the Business Council on the Reduction of Paperwork by *Clark R. Silcox;* for the National-American Wholesale Grocers' Association et al. by *Arthur Y. Tsien;* for the National Wholesale Druggists' Association by *Lawrence W. Bierlein;* and for Senator Lawton Chiles by *Daniel J. Popeo, Paul D. Kamenar,* and *Wayne Hartke.*

Burton D. Fretz, Toby S. Edelman, and *Edward F. Howard* filed a brief for the Action Alliance of Senior Citizens et al. as *amici curiae* urging affirmance.

promulgated a hazard communication standard. 29 CFR § 1910.1200 (1984). The standard imposed various requirements on manufacturers aimed at ensuring that their employees were informed of the potential hazards posed by chemicals found at their workplace. Specifically, the standard required chemical manufacturers to label containers of hazardous chemicals with appropriate warnings. "Downstream" manufacturers—commercial purchasers who used the chemicals in their manufacturing plants—were obliged to keep the original labels intact or else transfer the information onto any substitute containers. The standard also required chemical manufacturers to provide "material safety data sheets" to downstream manufacturers. The data sheets were to list the physical characteristics and hazards of each chemical, the symptoms caused by overexposure, and any pre-existing medical conditions aggravated by exposure. In addition, the data sheets were to recommend safety precautions and first aid and emergency procedures in case of overexposure and provide a source for additional information. Both chemical manufacturers and downstream manufacturers were required to make the data sheets available to their employees and to provide training on the dangers of the particular hazardous chemicals found at each workplace.

Respondent United Steelworkers of America, among others, challenged the standard in the Court of Appeals for the Third Circuit. That court held that the Occupational Safety and Health Administration (OSHA) had not adequately explained why the regulation was limited to the manufacturing sector, in view of the OSH Act's clear directive that, to the extent feasible, OSHA is to ensure that no employee suffers material impairment of health from toxic or other harmful agents. The court directed OSHA either to apply the hazard standard rules to workplaces in other sectors or to state reasons why such application would not be feasible. *United*

Steelworkers of America v. *Auchter*, 763 F. 2d 728, 739 (1985).

When DOL responded by initiating an entirely new rulemaking proceeding, the union and its copetitioners sought enforcement of the earlier order. The Third Circuit directed DOL, under threat of contempt, to publish in the Federal Register within 60 days either a hazard communication standard applicable to all workers covered by the OSH Act or a statement of reasons why such a standard was not feasible, on the basis of the existing record, as to each category of excluded workers. *United Steelworkers of America* v. *Pendergrass*, 819 F. 2d 1263, 1270 (1987).

DOL complied by issuing a revised hazard communication standard that applied to work sites in all sectors of the economy. See 52 Fed. Reg. 31852 (1987). At the same time, DOL submitted the standard to OMB for review of any paperwork requirements. After holding a public hearing, OMB approved all but three of its provisions. OMB rejected a requirement that employees who work at multiemployer sites (such as construction sites) be provided with data sheets describing the hazardous substances to which they were likely to be exposed, through the activities of any of the companies working at the same site. The provision permitted employers either to exchange data sheets and make them available at their home offices or to maintain all relevant data sheets at a central location on the work site. 29 CFR § 1910.1200(e)(2) (1988). OMB also disapproved a provision exempting consumer products used in the workplace in the same manner, and resulting in the same frequency and duration of exposure, as in normal consumer use. § 1910.1200(b)(6)(vii). Finally, OMB vetoed an exemption for drugs sold in solid, final form for direct administration to patients. § 1910.1200(b)(6)(viii). See 52 Fed. Reg. 46076 (1987).

OMB disapproved these provisions based on its determination that the requirements were not necessary to protect employees.[1] OMB's objection to the exemptions was that they were too narrow, and that the standard, therefore, applied to situations in which disclosure did not benefit employees.[2] *Id.*, at 46077–46078. DOL disagreed with OMB's assessment, but it published notice that the three provisions were withdrawn. DOL added its reasons for believing that the provisions were necessary, proposed that they be retained, and invited public comment. 53 Fed. Reg. 29822 (1988).

The union and its copetitioners responded by filing a motion for further relief with the Third Circuit. That court ordered DOL to reinstate the OMB-disapproved provisions. The court reasoned that the provisions represented good-faith compliance by DOL with the court's prior orders, that

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[1] OMB concluded that workers on multiemployer sites would be adequately protected if each employer kept chemical manufacturers' labels intact, supplied data sheets to other employers on the site on request, and taught its own employees about the chemicals with which they worked directly and explained how to recognize hazards likely to be introduced by other employers. 52 Fed. Reg. 46077 (1987).

[2] The standard promulgated by OSHA had exempted, from any otherwise applicable labeling requirements, all food and drugs subject to the labeling requirements of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U. S. C. § 301 *et seq.* (1982 ed.), and all consumer products or hazardous substances subject to a consumer product safety standard or labeling requirements of the Consumer Product Safety Act, 86 Stat. 1207, as amended, 15 U. S. C. § 2051 *et seq.*, or the Federal Hazardous Substances Act, 74 Stat. 372, as amended, 15 U. S. C. § 1261 *et seq.*, or regulations issued under those Acts by the Consumer Product Safety Commission. 29 CFR §§ 1910.1200(b)(5)(ii), 1910.1200(b)(5)(iv) (1988).

OMB wanted OSHA to exempt, in addition, all products packaged in the same form and concentration as a consumer product, whether or not used for the same purpose or with the same exposure, as well as all Food and Drug Administration regulated drugs handled in the nonmanufacturing sector. 52 Fed. Reg. 46078 (1987). OMB drew its recommended exemption for consumer products from § 311(e)(3) of the Superfund Amendments and Reauthorization Act of 1986, 100 Stat. 1615, 42 U. S. C. § 9601 *et seq.* (1982 ed., Supp. V), a provision aimed at informing the general public about chemicals that could cause hazardous conditions during an emergency situation.

OMB lacked authority under the Paperwork Reduction Act to disapprove the provisions, and that, therefore, DOL had no legitimate basis for withdrawing them. *United Steelworkers of America* v. *Pendergrass*, 855 F. 2d 108 (1988).

Petitioners sought review in this Court. We granted certiorari to answer the important question whether the Paperwork Reduction Act authorizes OMB to review and countermand agency regulations mandating disclosure by regulated entities directly to third parties. 490 U. S. 1064 (1989). We hold that the Paperwork Reduction Act does not give OMB that authority, and therefore affirm.

II

The Paperwork Reduction Act was enacted in response to one of the less auspicious aspects of the enormous growth of our federal bureaucracy: its seemingly insatiable appetite for data. Outcries from small businesses, individuals, and state and local governments, that they were being buried under demands for paperwork, led Congress to institute controls.[3] Congress designated OMB the overseer of other agencies with respect to paperwork and set forth a comprehensive scheme designed to reduce the paperwork burden. The Act charges OMB with developing uniform policies for efficient information processing, storage, and transmittal systems, both within and among agencies. OMB is directed to reduce federal collection of all information by set percentages, establish a Federal Information Locator System, and develop and implement procedures for guarding the privacy of those providing confidential information. See 44 U. S. C. §§ 3504, 3505, 3511 (1982 ed. and Supp. V).

The Act prohibits any federal agency from adopting regulations which impose paperwork requirements on the public unless the information is not available to the agency from another source within the Federal Government, and the agency must formulate a plan for tabulating the information in a useful manner. Agencies are also required to minimize the burden on the public to the extent practicable. See 44 U. S. C. § 3507(a)(1) (1982 ed. and Supp. V). In addition, the Act institutes a second layer of review by OMB for new paperwork requirements. After an agency has satisfied itself that an instrument for collecting information—termed an "information collection request"—is needed, the agency must submit the request to OMB for approval. See 44 U. S. C. § 3507(a)(2) (1982 ed., Supp. V). If OMB disapproves the request, the agency may not collect the information. See 44 U. S. C. § 3507(a)(3) (1982 ed.).

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[3] See S. Rep. No. 96–930, pp. 3–4, 8 (1980) (S. Rep.); H. R. Rep. No. 96–835, pp. 3, 17 (1980) (H. R. Rep.).

Typical information collection requests include tax forms, Medicare forms, financial loan applications, job applications, questionaires, compliance reports, and tax or business records. See S. Rep., at 3–4. These information requests share at least one characteristic: The information requested is provided to a federal agency, either directly or indirectly.[4] Agencies impose the requirements on private parties in order to generate information to be used by the agency in pursuing some other purpose. For instance, agencies use these information requests in gathering background on a particular subject to develop the expertise with which to devise or fine-tune appropriate regulations, amassing diffuse data for processing into useful statistical form, and monitoring business records and compliance reports for signs or proof of nonfeasance to determine when to initiate enforcement measures.

By contrast, disclosure rules do not result in information being made available for agency personnel to use. The promulgation of a disclosure rule is a final agency action that represents a substantive regulatory choice. An agency charged with protecting employees from hazardous chemicals has a mandatory. Similarly, data sheets consisting of advisory material on health and safety do not fall within the normal meaning of "records," and a Government-imposed reporting requirement customarily requires reports to be made to the Government, not training and labels to be given to someone else altogether.

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[4] Tax and business records are examples of information provided only indirectly to an agency. In these cases, the governing regulations do not require records to be sent to the agency; they require only that records be kept on hand for possible examination as part of a compliance review.

That a more limited reading of the phrase "reporting and recordkeeping requirements" was intended derives some further support from the words surrounding it. The traditional canon of construction, *noscitur a sociis*, dictates that "'words grouped in a list should be given related meaning.'" *Massachusetts* v. *Morash*, *supra*, at 114–115, quoting *Schreiber*, *supra*, at 8. The other examples listed in the definitions of "information collection request" and "collection of information" are forms for communicating information to the party requesting that information. If "reporting and recordkeeping requirements" is understood to be analogous to the examples surrounding it, the phrase would comprise only rules requiring information to be sent or made available to a federal agency, not disclosure rules.

The same conclusion is produced by a consideration of the object and structure of the Act as a whole. See *Offshore Logistics, Inc.* v. *Tallentire*, 477 U. S. 207, 220–221 (1986) (concluding that the meaning of a phrase was clarified by the language and purpose of the Act as a whole). Particularly useful is the provision detailing Congress' purposes in enacting the statute. The Act declares that its purposes are:

> "(1) to minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons;
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> "(2) to minimize the cost *to the Federal Government* of collecting, maintaining, using, and disseminating information;
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> "(3) to maximize the usefulness of information collected, maintained, and disseminated *by the Federal Government;*

> "(4) to coordinate, integrate and, to the extent practicable and appropriate, make uniform Federal information policies and practices;
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> "(5) to ensure that automatic data processing, telecommunications, and other information technologies are acquired and used by the Federal Government in a manner which improves service delivery and program management, increases productivity, improves the quality of decisionmaking, reduces waste and fraud, and wherever practicable and appropriate, reduces the information processing burden for the Federal Government and *for persons who provide information to and for the Federal Government;* and
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> "(6) to ensure that the collection, maintenance, use and dissemination of information *by the Federal Government* is consistent with applicable laws relating to confidentiality, including . . . the Privacy Act." 44 U. S. C. §3501 (1982 ed. and Supp. V) (emphasis added).

Disclosure rules present none of the problems Congress sought to solve through the Paperwork Reduction Act, and none of Congress' enumerated purposes would be served by subjecting disclosure rules to the provisions of the Act. The statute makes clear that the first purpose—avoiding a burden on private parties and state and local governments—refers to avoiding "the time, effort, or financial resources expended by persons to provide information *to a Federal agency.*" 44 U. S. C. §3502(3) (1982 ed.) (defining "burden") (emphasis added). Because Congress expressed concern only for the burden imposed by requirements to provide information to a federal agency, and not for any burden imposed by requirements to provide information to a third party, OMB review of disclosure rules would not further this congressional aim.

Congress' second purpose—minimizing the Federal Government's cost of handling information—also would not be advanced by review of disclosure rules because such rules do not impose any information processing costs on the Federal

Government. Because the Federal Government is not the consumer of information "requested" by a disclosure rule nor an intermediary in its dissemination, OMB review of disclosure rules would not serve Congress' third, fourth, fifth, or sixth purposes. Thus, nothing in Congress' itemized and exhaustive textual description of its reasons for enacting this particular Act indicates any legislative purpose to have OMB screen proposed disclosure rules. We find this to be strong evidence that Congress did not intend the Act to authorize OMB review of such regulations.

This conclusion is buttressed by the language and import of other provisions of the Act. For instance, every federal agency is required to take three internal preliminary steps before adopting an information collection request. The agency must take action to

> "(A) eliminate, through the use of the Federal Information Locator System and other means, information collections which seek to obtain information available from another source within the Federal Government;
>
> "(B) reduce to the extent practicable and appropriate the burden on persons who will provide information *to the agency;* and
>
> "(C) formulate plans for tabulating the information in a manner which will enhance its usefulness to other agencies and to the public." 44 U. S. C. § 3507(a)(1) (1982 ed.) (emphasis added).

These requirements affect agencies only when they gather information for their own use. The first directs an agency not to ask for information that it can acquire from another agency.[5] The second requires an agency to consider the burden it places on the public, but only as to information provided *to the agency*. The third encourages an agency to make the information it has obtained useful to others as well. Significantly, no provision relates to disclosure rules. For example, no provision requires agencies to ensure that a paperwork requirement is effective or that its burden on one party is not disproportionate to the benefit afforded a third party.

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[5] See H. R. Rep., at 28 (the agency "is to eliminate any information collections which seek to obtain information available from other sources within the Federal Government").

Also instructive are the provisions governing OMB's review of proposed agency information collection requests that cast that review in terms applicable to information-gathering regulations but not to disclosure rules. OMB's examination is limited to "determining whether the collection of information *by an agency* is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility *for the agency.*" 44 U. S. C. §3504(c)(2) (1982 ed.) (emphasis added). "Practical utility" is defined in the statute as "the ability *of an agency* to use information it collects, particularly the capability to process such information in a timely and useful fashion." 44 U. S. C. §3502(16) (1982 ed., Supp. V) (emphasis added).

However, in reviewing the disclosure rules at issue in this case, OMB was unable to consider what OSHA planned to do with information regarding hazardous chemicals at the various work sites, because OSHA was not to be the recipient of this information. Nothing was to be given to OSHA to process—in a timely fashion or otherwise. OMB instead disapproved the three OSHA rules on the ground that the mandated disclosures would be of little benefit *to the employees* OSHA sought to protect. But there is no indication in the Paperwork Reduction Act that OMB is authorized to determine the usefulness of agency-adopted warning requirements to those being warned. To the contrary, Congress focused exclusively on the utility of the information *to the agency.* And the only criteria specified are whether the agency can process the information quickly and use it in pursuit of its substantive mandate.

Yet a third provision reinforcing our conclusion that disclosure rules are not subject to the Paperwork Reduction Act is the statute's mechanism for assuring agency compliance with its terms. When OMB approves an information collection request, it issues a control number which is placed on all forms. If a request does not receive OMB approval, it is not issued a control number and the agency is prohibited from collecting the information. See 44 U. S. C. §§3504(c)(3)(A), 3507(f) (1982 ed.). In addition, if the agency nevertheless promulgates the paperwork requirement, members of the public may ignore it without risk of penalty. See 44 U. S. C. §3512 (1982 ed.).[6] However, this protection of the public is applicable only to information-gathering rules. Section 3512 provides that "no person shall be subject to any penalty for failing to maintain or provide information *to any agency* if the information collection request involved . . . does not display a current control number assigned by the [OMB] . . . ." *Ibid.* (emphasis added).

While the grammar of this text can be faulted, its meaning is clear: the public is protected under the Paperwork Reduction Act from paperwork regulations not issued in compliance with the Act, only when those regulations dictate that a person maintain information *for an agency* or provide information *to an agency.* By its very terms, the statute's enforcement mechanism does not apply to rules which require disclosure to a third party rather than to a federal agency. Thus either Congress intended the Paperwork Reduction Act to cover information-gathering rules only, or Congress intended the Act to cover disclosure rules but intended to exempt them from this agency compliance mechanism. Because the latter is counterintuitive and contrary to clear legislative history,[7] §3512 is further evidence that Congress did not intend the Act to cover disclosure rules.

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[6] See *id.*, at 20 (The Act "allow[s] the public, by refusing to answer these [information collection requests], to help control 'outlaw forms' ").

[7] See S. Rep., at 52–53 ("The only collections of information by a Federal agency which are exempted, and for which a person or persons could

III

For the foregoing reasons, we find that the terms "collection of information" and "information collection request," when considered in light of the language and structure of the Act as a whole, refer solely to the collection of information by, or for the use of, a federal agency; they cannot reasonably be interpreted to cover rules mandating disclosure of information to a third party. In addition, we find unpersuasive petitioners' claims that there is a "clearly expressed legislative intention [to the] contrary," see *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 432, n. 12 (1987).

Petitioners rely on statements from various stages of the Act's legislative history as evidence that Congress intended "collection of information" to include disclosure rules.[8] However, the statements show merely that the Act was intended

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not claim protection under section 3512, are those collections of information which this chapter does not apply to and are exempted by section 3518 [certain law enforcement and national security exceptions]"). See also H. R. Rep., at 30.

[8] See Report of Commission on Federal Paperwork, The Reports Clearance Process 1, 43 (Sept. 9, 1977) (explaining that the Federal Trade Commission did not interpret the Federal Reports Act of 1942, predecessor to the Paperwork Reduction Act, to apply to information it collected for law enforcement purposes nor did the Securities and Exchange Commission interpret that Act to apply to information the SEC collected for possible disclosure by the agency to the public); Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 before the Subcommittee on Federal Spending Practices and Open Government of the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess., 87 (1979) (testimony of SEC Commissioner Evans that the definition of collection of information in the Federal Reports Act was limited to collection for statistical purposes; testimony of Senator Chiles that Congress was not trying to cripple the mission of the agencies but was "trying to put some governor on this thirst for information"); S. Rep., at 39–40 (explaining that the Senate had rejected the SEC's attempt to limit "collection of information" to collection for statistical purposes, that the definition extended to documents filed with the SEC for possible disclosure to the public by the SEC, and that OMB's review of these filing requirements should consider whether the SEC could use the data either to carry out its regulatory functions or to make it available to the public).

to reach not only statistical compilations but also information collected for law enforcement purposes and information filed with an agency for possible dissemination to the public (*i. e.*, when the agency is an intermediary in the process of data dissemination). This sheds no light on the issue before this Court: Whether the Act reaches rules mandating disclosure by one party directly to a third party. Moreover, other statements in the Committee Reports reinforce respondents' position.[9]

Because we find that the statute, as a whole, clearly expresses Congress' intention, we decline to defer to OMB's interpretation.[10] See *Board of Governors of Federal Reserve*

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[9] See, *e. g.*, H. R. Rep., at 3 (the Act resulted from "a growing concern that the way *the Government collects, uses, and disseminates* information must be improved") (emphasis added); *id.*, at 22 (explaining the "practical utility" review as a response to the tendency of agencies to "collect reams of data on the basis of need only to store the data unused" thereby imposing "an unnecessary reporting burden on those individuals or organizations being asked to provide it"); S. Rep., at 11 ("[T]he essential purpose of the legislation [is] to reduce the burden on the public in providing information *to the Federal Government*") (emphasis added); *id.*, at 46 ("A Federal agency is considered to 'sponsor' the collection of information if the agency itself collects information or if it uses a procurement contract and the contractor collects information for the agency"); Senate Hearings, *supra*, at 40–41 (testimony of Wayne G. Granquist, Assoc. Dir., OMB) ("No one questions the basic need of the government for information to plan, make policy decisions, operate and evaluate programs, and perform necessary research. The question is rather how much information is essential").

[10] OMB's assumption of the authority to review the three provisions of the hazard communication standard at issue was consistent with its own regulations. See 5 CFR § 1320.7(c)(2) (1988) ("Requirements by an agency for a person to obtain or compile information for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements, constitute the 'collection of information' whenever the same requirment to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency"); § 1320.7(q) (defining "reporting requirement" as "a requirement imposed by an agency on persons to provide information to another person or to the agency"). Petitioners' argument

System v. *Dimension Financial Corp.*, 474 U. S. 361, 368 (1986) ("The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress"); *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984) ("If the intent of Congress is clear, that is the end of the matter"). We affirm the judgment of the Third Circuit insofar as it held that the Paperwork Reduction Act does not give OMB the authority to review agency rules mandating disclosure by regulated entities to third parties.[11]

It is so ordered.

JUSTICE WHITE, with whom THE CHIEF JUSTICE joins, dissenting.

The Court's opinion today requires more than 10 pages, including a review of numerous statutory provisions and legislative history, to conclude that the Paperwork Reduction Act of 1980 (PRA or Act) is clear and unambiguous on the question whether it applies to agency directives to private parties to collect specified information and disseminate or make it available to third parties. On the basis of that questionable conclusion, the Court refuses to give *any* deference to the Office of Management and Budget's (OMB's) longstanding and consistently applied interpretation that such requirements fall within the Act's scope. Because in my view the Act is not clear in that regard and deference is due OMB under

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that we should defer to OMB's interpretation, as expressed in these regulations, is foreclosed by our finding of clear congressional intent.

[11] We do not reach the question whether other provisions of the hazard communication standard might legitimately be subject to OMB review under the Paperwork Reduction Act. See 29 CFR § 1910.1200(e) (1988) (requiring employers to develop written programs describing their compliance and make them available to the agency on request); § 1910.1200(g)(11) (requiring employers to make their material safety data sheets available to the agency on request). Only the three provisions OMB disapproved are before us today.

Chevron U. S. A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), I respectfully dissent.

In *Chevron, supra*, we set forth the general principles to be applied in cases such as this one:

> "When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 842–843 (footnotes omitted).

As the Court acknowledges, there is no question in this case that OMB is the agency charged with administering the PRA. Unless Congress has directly spoken to the issue whether an agency request that private parties disclose to, or maintain for, third parties information such as material safety data sheets (MSDS's) is an "information collection request" or a "recordkeeping requirement" within the Act's scope, OMB's interpretation of the Act is entitled to deference, provided of course that it is based on a permissible construction of the statute.

The Court concedes that the Act does not expressly address "whether Congress intended the Paperwork Reduction Act to apply to disclosure rules as well as information-gathering rules." *Ante*, at 34. Curiously, the Court then almost immediately asserts that interpreting the Act to provide coverage for disclosure requests is untenable. *Ante*, at

35. The plain language of the Act, however, suggests the contrary. Indeed, the Court appears to acknowledge that petitioners' interpretation of the Act, although not the one the Court prefers, is nonetheless reasonable: "Petitioners' interpretation . . . is not the *most* natural reading of this language." *Ibid.* (emphasis added). The Court goes on to arrive at what it believes is the *most* reasonable of plausible interpretations; it cannot rationally conclude that its interpretation is the *only* one that Congress could possibly have intended. The Court neglects to even mention that the only other Court of Appeals besides the Third Circuit in this case to address a similar question rejected the interpretation that the Court now adopts.[1] In addition, there is evidence that

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[1] In *Action Alliance of Senior Citizens of Philadelphia* v. *Bowen*, 269 U. S. App. D. C. 463, 846 F. 2d 1449 (1988), the court rejected an argument that the Federal Reports Act of 1942, 44 U. S. C. § 3501 *et seq.* (1976 ed.), the PRA's predecessor, did not cover an agency request that private parties conduct self-evaluations which should then be made available to the public and the agency upon request. The court stated:

"The claim is pure pettifoggery. Appellants cannot seriously believe that in enacting the Reports Act Congress was concerned solely or primarily with private parties' costs of *mailing* data to Washington; it is the recordkeeping and data-gathering that constitute the burden. Moreover, OMB and its predecessor, the Bureau of the Budget, have interpreted the statutory term 'collection of information' for nearly half a century to encompass '[a]ny general or specific requirement for the *establishment or maintenance* of records . . . which are to be used *or be available for use* in the collection of information.' Regulation A, Federal Reporting Services, Clearance of Plans and Reports Forms, Title I(1)(e) (February 13, 1943) . . . . Even under the deference we owe the agency, *Chevron U. S. A., Inc.* v. *Natural Resources Defense Council* [, *Inc.*, 467 U. S. 837, 842–845 (1984)], we doubt we could uphold a view of the Reports Act that made physical delivery to an agency essential to the notion of 'collection of information.' Happily we confront no such oddity." 269 U. S. App. D. C., at 467–468, 846 F. 2d, at 1453–1454 (emphasis in original).

Notably, by enacting the PRA Congress intended to *expand* the scope of authority OMB and its predecessor had been given under the Reports Act. See Paperwork and Redtape Reduction Act of 1979: Hearing on S. 1411 before the Subcommittee on Federal Spending Practices and Open Govern-for years OMB has been reviewing proposals similar to the standard at issue in this case routinely and without objection from other agencies.[2] As I see it, by independently construing the statute rather than asking if the agency's interpretation is a permissible one and deferring to it if that is the case, the Court's approach is clearly contrary to *Chevron*.

The hazard communication standards propounded by the Occupational Safety and Health Administration (OSHA) require chemical manufacturers to develop hazard information about their products, to adequately label such products, and to prepare for their products MSDS's to be sent to downstream employers who utilize those products. See 29 CFR §§ 1910.1200(d), (f) and (g) (1988). Those employers are directed to prepare written hazard communication programs that include a list of hazardous chemicals known to be present at the work site, § 1910.1200(e); to ensure that containers are properly labeled, § 1900.1200(f); and to collect, maintain, and make available to their employees copies of MSDS's with respect to hazardous chemicals that they use in their business, § 1910.1200(g).

OMB, as I see it, reasonably concluded that these requirements were subject to its approval under the PRA, which

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ment of the Senate Committee on Governmental Affairs, 96th Cong., 1st Sess., 24–60, 119–125 (1979) (hereinafter S. 1411 Hearings) (comments of OMB and the Comptroller General noting that the proposed legislation would cure deficiencies in the coverage of the Federal Reports Act); S. Rep. No. 96–930, p. 13 (1980).

[2] For example, OMB has reviewed Environmental Protection Agency community right-to-know disclosure requests, 52 Fed. Reg. 38344, 38364 (1987), Federal Trade Commission textile fiber products identification disclosure and fair packaging and fair labeling disclosure requests, 53 Fed. Reg. 5986, 5987 (1988), and Food and Drug Administration nutrition labels. 52 Fed. Reg. 28607 (1987). In this case, the Secretary of Labor and OMB have consistently agreed that the hazard communication standard is subject to review under the Act. See 47 Fed. Reg. 12092, 12111 (1982); 48 Fed. Reg. 53280 (1983); 52 Fed. Reg. 31852, 31870 (1987); 53 Fed. Reg. 29822, 29826, 29849–29850 (1988). Courts should be particularly reluctant to intervene in the regulatory process when the executive agencies have been able to cooperate effectively.

makes OMB responsible for implementing the statutory purpose of minimizing the burden and maximizing the usefulness of the Government's information collection requirements. OMB is instructed to do this through a process of reviewing agency "information collection requests" in order to determine whether "the collection of information by an agency is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility for the agency." 44 U. S. C. § 3504(c)(2) (1982 ed.).

An "information collection request" is defined as "a written report form, application form, schedule, questionnaire, reporting or recordkeeping requirement, collection of information requirement, or similar method calling for the collection of information." 44 U. S. C. § 3502(11) (1982 ed., Supp V). A "recordkeeping requirement" is defined as "a requirement imposed by an agency on persons to maintain specified records." § 3502(17). "Collection of information" is defined as

> "the obtaining or soliciting of facts or opinions by an agency through the use of written report forms, application forms, schedules, questionnaires, reporting or recordkeeping requirements, or other similar methods calling for either—
>
> "(A) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or
>
> "(B) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes." 44 U. S. C. § 3502(4) (1982 ed.).

"Reporting requirement" is not specifically defined by the statute.

As it is directed to do by the PRA, see § 3516, OMB has issued regulations and rules for exercising its authority under the statute. Although the statute itself does not in so many words reach agency directives to collect, disseminate, or make available to third parties specified information that is not delivered to the agency itself, OMB regulations so interpret the Act. The regulations also plainly reach the hazard communication standards that OSHA has presented for OMB's approval in this case.[3]

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[3] Relevant to this case are the following definitions promulgated by OMB as 5 CFR § 1320.7 (1989):

"(c) 'Collection of information' means the obtaining or soliciting of information by an agency from ten or more persons by means of identical questions, or identical reporting or recordkeeping requirements, whether such collection of information is mandatory, voluntary, or required to obtain a benefit. For purposes of this definition, the 'obtaining or soliciting of information' includes any requirement or request for persons to obtain, maintain, retain, report, *or publicly disclose information.* In the Act, a 'collection of information requirement' is a type of 'information collection request.' As used in this part, a 'collection of information' refers to the act of collecting information, to the information to be collected, to a plan and/or an instrument calling for the collection of information, or any of these, as appropriate.

"(1) A 'collection of information' includes the use of written report forms, application forms, schedules, questionnaires, *reporting or recordkeeping requirements*, or other similar methods. Similar methods may include . . . *disclosure requirements* [and] *labeling requirements* . . . .

"(2) Requirements by an agency for a person to obtain or compile information *for the purpose of disclosure to members of the public or to the public at large, through posting, notification, labeling, or similar disclosure requirements*, constitute the 'collection of information' whenever the same requirement to obtain or compile information would be a 'collection of information' if the information were directly provided to the agency. The public disclosure of information originally supplied by the Federal government to the recipient for the purpose of disclosure to the public is not included within this definition.

. . . . .

"(p) 'Recordkeeping requirement' means a requirement imposed by an agency on persons to maintain specified records and *includes requirements that information be maintained or retained by persons but not necessarily provided to an agency.*

"(q) 'Reporting requirement' means a requirement imposed by an agency on persons to provide information *to another person* or to the

I cannot say that these regulations, so far as they are involved here, are inconsistent with the Act. It is not unreasonable to characterize as a "reporting requirement" an employer's obligation to disclose hazard information, by labeling or making MSDS's available, especially in light of the absence of a definition in the statute. Nor is it unreasonable to characterize the obligation to compile copies of MSDS's as a "recordkeeping requirement," or the directive to prepare a hazard communication program with its *list* of dangerous chemicals as an "information collection request" within the meaning of 44 U. S. C. § 3502 (1982 ed., Supp. V). Since that definitional section, after including reporting and recordkeeping requirements, concludes with the words "or other similar method calling for the collection of information," it is tenable to conclude that reporting and recordkeeping are among the information collection requests requiring OMB approval.

Section 3502(4) likewise defines "collection of information" as including reporting and recordkeeping requirements, but that definition begins with the words "the obtaining or soliciting of facts or opinions by an agency" through written report forms, etc. The Court's argument is that this definition limits the PRA to facts or opinions obtained by an agency for its own use and hence excludes recordkeeping, reporting requirements, and information collection designed to inform or benefit third parties such as employees, customers, or the public. This argument, however, pays too little attention to the precise language of the provision. First, an agency does not "obtain" information when it imposes a recordkeeping requirement. Second, § 3502(4) not only speaks of "obtaining" facts and opinions by an agency but of the "soliciting" of facts and opinions by an agency. The word "soliciting" would appear to mean something beside "obtaining" and is commonly understood as including a request for another person to per-

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agency. Reporting requirements may implicitly or explicitly include related recordkeeping requirements." (Emphasis added.)

form some act. It is not unreasonable therefore to construe this language as extending OMB's authority to requests for recordkeeping, reporting, and information collection that is intended to benefit third parties but is not delivered to the agency itself.

Furthermore, the Court does not explain why if "information collection requests" and the "collection of information" are limited to agency directives that information be provided *to* the agency, the statutory definitions of those terms explicitly include "recordkeeping requirement[s]." See 44 U. S. C. §§3502(4) and (11) (1982 ed. and Supp. V). One response might be that Congress intended to limit the term "recordkeeping requirement" to records prepared for the agency and which must be provided to the agency upon request. But Congress specifically defined the term "recordkeeping requirement" without including such a limitation and it is unlikely Congress intended to imply such a limitation. An agency can certainly "use" information without collecting and analyzing it or periodically auditing it for compliance or enforcement purposes. It can hardly be said that requiring recordkeeping and reporting for the benefit of employees is not useful to the agency or an appropriate means for the agency to carry out its obligation to provide a safe workplace.

It is common ground in this case that if the information required to be reported or made available to employees were first sent to the agency and then distributed to employees, there would be no question about OMB's authority. Likewise, as I understand it, the mere fact that the records ordered to be kept are not physically delivered to the agency does not bar OMB jurisdiction, so long as the records are kept for examination and use by the agency. The Court concedes as much, noting that requests for information provided indirectly to an agency, such as requirements that tax and business records be kept on hand, fall within the PRA's scope because those documents are subject to "possible examination as part of a compliance review." *Ante*, at 33, n. 4.

In support of its argument that the Act applies only when information is actually transmitted to an agency, the Court points to language in the Act's general statement of purpose indicating that Congress was concerned with minimizing "'the cost to the Federal Government,'" maximizing "'the usefulness of information collected, maintained, and disseminated by the Federal Government,'" and reducing the paperwork burdens "'for persons who provide information to and for the Federal Government.'" *Ante*, at 36–37 (emphasis deleted), quoting 44 U. S. C. § 3501 (1982 ed. and Supp. V). The Court ignores, however, the very first statement of purpose in the Act, which declares that Congress intends that the Act "minimize the Federal paperwork burden for individuals, small businesses, State and local governments, and other persons." 44 U. S. C. § 3501(1) (1982 ed.). Reading the Court's discussion of the Act, one might think that Congress was only concerned with minimizing the Government's costs and reducing the paperwork burdens on federal agency employees who are forced to process massive amounts of information. Common sense and § 3501(1) clearly belie that conclusion.[4] Complaints from the private sector about bureaucratic red tape far predate the enactment of the PRA.

Also curious is the Court's reliance on the statement that one purpose of the Act was to reduce the paperwork burden "for persons who provide information to and *for* the Federal Government." 44 U. S. C. § 3501(5) (1982 ed., Supp. V) (emphasis added). Aside from reiterating the point just made regarding the Act's focus on reducing the paperwork burdens on the private sector, the natural reading of the statement is that Congress recognized that agencies may sometimes request that private parties provide information to others as part of an agency's administration of its duties. It is surely reasonable to conclude that the word "for" means something different than the word "to" and that it includes not only situations in which private parties must keep records available for use and review by an agency, but also requirements that private parties collect and provide information to third parties.

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[4] In this same vein, § 3504, in setting forth OMB's authority and functions in administering the Act, directs that the information collection request clearance and other paperwork control functions of the Office shall include "setting goals for reduction of the burdens of Federal information collection requests." 44 U. S. C. § 3504(c)(5) (1982 ed.). See also § 3505(1), which directs OMB to set goals to reduce the paperwork burdens by specified percentages, as well as § 3507(a)(1)'s requirement that agencies take action to reduce the paperwork burden of a proposal before submitting such proposals to OMB.

Contrary to the Court's assertions, disclosure requests do present some of the problems Congress sought to solve through the PRA. The Court concedes that Congress intended the Act to apply when information is "filed with an agency for possible dissemination to the public (*i. e.*, when the agency is an intermediary in the process of data dissemination)." *Ante*, at 42. But if that is true, how can it be so clear that Congress intended to permit agencies to bypass the Act by simply requesting private parties to submit information directly to third parties? From a policy perspective, and certainly from the private sector's perspective, it makes little difference whether an agency collects information and then disseminates it or requires those in possession of the information to submit it directly to the relevant third parties. In fact, the latter option generally will impose *greater* paperwork burdens on private parties, although either choice results in a federal agency imposing major paperwork burdens on the private sector. The Court's response is that one approach imposes costs on the Federal Government and the other does not. But that distinction is flawed because it promotes a secondary objective of the PRA and ignores what I consider to have been Congress' primary objective in enacting the statute.

In addition, the legislative history on which the Court relies is unconvincing. Like the statute itself, the legislative history never expressly addresses the question of disclosure requirements. Of course, the Court can find and cite to legislative history that is allegedly relevant to and supports its interpretation of the statute, but one can just as easily point to legislative history of similar quality supporting an alternative construction of the Act. See *ante*, at 41–42, and nn. 8, 9.[5]

Since the statute itself is not clear and unambiguous, the legislative history is muddy at best, and OMB has given the statute what I believe is a permissible construction, I cannot agree with the outcome the Court reaches. If *Chevron* is to have meaning, it must apply when a statute is as ambiguous on the issue at hand as the PRA is on the subject of disclosure requirements. Contrary to the Court of Appeals and to the majority, I would defer to OMB's position that the obligation to compile copies of MSDS's and the labeling requirements are information collection requests subject to its approval. It follows that OMB was not acting contrary to the statute in disapproving the three provisions specifically involved in this case.

But even accepting for the moment the Court's construction of the statute, it is notable that the Court fails to consider whether the requirement that employers at multiemployer work sites file all of the relevant MSDS's in a central location or exchange them and make them available at their home offices, see 29 CFR § 1910.1200(e)(2) (1988), might be considered a "recordkeeping requirement." Granted, one purpose of the multiemployer standard is to provide workers with an opportunity to learn the dangers associated with the handling of particular materials used on the work site; nonetheless, the proposed standard does not require employers to actually disseminate the MSDS's to their workers. Rather it requires them to physically compile and maintain massive quantities of paperwork at multiemployer job sites, such as construction sites, or their home offices. This requirement certainly looks like a "recordkeeping requirement" in the plainest sense of the term. In addition, the Department of Labor may periodically check these records for compliance with substantive requirements, see §§ 1910.1200(e)(4) and (g)(11), a factor the Court emphasizes in describing which recordkeeping requests are subject to the Act. As I see it, even under the Court's interpretation of the Act, this portion of the standard should be subject to OMB review.

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[5] In particular, see S. 1411 Hearings, at 61–87; H. R. Rep. No. 96–835, pp. 18–23 (1980); S. Rep. No. 96–930, pp. 13, 39–40 (1980).

Finally, an argument that the Court does not make but which the United Steelworkers do is that *Chevron* should not apply in this case because OMB's regulations actually determine the scope of its jurisdiction under the Act. This Court has never accepted that argument and in fact, as JUSTICE SCALIA pointed out in his lucid concurrence in *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U. S. 354, 377 (1988), there are good reasons not to accept it, reasons which JUSTICE SCALIA has adequately set forth and which I will not repeat here. I note, however, that *Chevron* itself and several of our cases decided since *Chevron* have deferred to agencies' determinations of matters that affect their own statutory jurisdiction.[6] See, *e. g.*, *Massachusetts* v. *Morash*, 490 U. S. 107, 116–118 (1989); *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 292–293 (1988); *EEOC* v. *Commercial Office Products Co.*, 486 U. S. 107, 114–116 (1988); *NLRB* v. *Food and Commercial Workers*, 484 U. S. 112,

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[6] In any event, the PRA itself provides a check on OMB's ability to expand its jurisdiction, at least with respect to independent regulatory agencies. Section 3507(c) provides as follows:

"Any disapproval by the Director, in whole or in part, of a proposed information collection request of an independent regulatory agency . . . may be voided, if the agency by a majority vote of its members overrides the Director's disapproval or exercise of authority. The agency shall certify each override to the Director, [and] shall explain the reasons for exercising the override authority. Where the override concerns an information collection request, the Director shall without further delay assign a control number to such request, and such override shall be valid for a period of three years."

123–128 (1987); *Japan Whaling Assn.* v. *American Cetacean Society*, 478 U. S. 221, 233 (1986); *Commodity Futures Trading Comm'n* v. *Schor*, 478 U. S. 833, 845 (1986); *Chemical Manufacturers Assn.* v. *Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125–126 (1985). The application of *Chevron* principles cannot be avoided on this basis.

For the foregoing reasons, I respectfully dissent.

REVES ET AL. *v.* ERNST & YOUNG

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 88–1480. Argued November 27, 1989—Decided February 21, 1990

In order to raise money to support its general business operations, the Farmers Cooperative of Arkansas and Oklahoma (Co-Op) sold uncollateralized and uninsured promissory notes payable on demand by the holder. Offered to both Co-Op members and nonmembers and marketed as an "Investment Program," the notes paid a variable interest rate higher than that of local financial institutions. After the Co-Op filed for bankruptcy, petitioners, holders of the notes, filed suit in the District Court against the Co-Op's auditor, respondent's predecessor, alleging, *inter alia*, that it had violated the antifraud provisions of the Securities Exchange Act of 1934—which regulates certain specified instruments, including "any note[s]"—and Arkansas' securities laws by intentionally failing to follow generally accepted accounting principles that would have made the Co-Op's insolvency apparent to potential note purchasers. Petitioners prevailed at trial, but the Court of Appeals reversed. Applying the test created in *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, to determine whether an instrument is an "investment contract" to the determination whether the Co-Op's instruments were "notes," the court held that the notes were not securities under the 1934 Act or Arkansas law, and that the statutes' antifraud provisions therefore did not apply.

Held: The demand notes issued by the Co-Op fall under the "note" category of instruments that are "securities." Pp. 60–76.

(a) Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called. However, notes are used in a variety of settings, not all of which involve investments. Thus, they are not securities *per se*, but must be defined using the "family resemblance" test. Under that test, a note is presumed to be a security unless it bears a strong resemblance, determined by examining four specified factors, to one of a judicially crafted list of categories of instrument that are not securities. If the instrument is not sufficiently similar to a listed item, a court must decide whether another category should be added by examining the same factors. The application of the *Howey* test to notes is rejected, since to hold that a "note" is not a "security" unless it meets a test designed for an entirely different variety of instrument would make the 1933 Securities Act's and the 1934 Act's enumeration of many types of instruments superfluous and would be inconsistent with Congress' intent in enacting the laws. Pp. 60–67.

(b) Applying the family resemblance approach, the notes at issue are "securities." They do not resemble any of the enumerated categories of nonsecurities. Nor does an examination of the four relevant factors suggest that they should be treated as nonsecurities: (1) the Co-Op sold them to raise capital, and purchasers bought them to earn a profit in the form of interest, so that they are most naturally conceived as investments in a business enterprise; (2) there was "common trading" of the notes, which were offered and sold to a broad segment of the public; (3) the public reasonably perceived from advertisements for the notes that they were investments, and there were no countervailing factors that would have led a reasonable person to question this characterization; and (4) there was no risk-reducing factor that would make the application of the Securities Acts unnecessary, since the notes were uncollateralized and uninsured and would escape federal regulation entirely if the Acts were held not to apply. The lower court's argument that the demand nature of the notes is very uncharacteristic of a security is unpersuasive, since an instrument's liquidity does not eliminate the risk associated with securities. Pp. 67–70.

(c) Respondent's contention that the notes fall within the statutory exception for "any note . . . which has a maturity at the time of issuance of not exceeding nine months" is rejected, since it rests entirely on the premise that Arkansas' statute of limitations for suits to collect demand notes—which are due immediately—is determinative of the notes' "maturity," as that term is used in the *federal* Securities Acts. The "maturity" of notes is a question of federal law, and Congress could not have intended that the Acts be applied differently to the same transactions depending on the accident of which State's law happens to apply. Pp. 70–72.

(d) Since, as a matter of federal law, the words of the statutory exception are far from plain with regard to demand notes, the exclusion must be interpreted in accordance with the exception's purpose. Even assuming that Congress intended to create a bright-line rule exempting from coverage *all* notes of less than nine months' duration on the ground that short-term notes are sufficiently safe that the Securities Acts need not apply, that exemption would not cover the notes at issue here, which do not necessarily have short terms, since demand could just as easily be made years or decades into the future. Pp. 72–73.

856 F. 2d 52, reversed and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, and IV, in which BRENNAN, BLACKMUN, STEVENS, and KENNEDY, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 73. REHNQUIST, C. J., filed an opinion concurring in part and dissenting in part, in which WHITE, O'CONNOR, and SCALIA, JJ., joined, *post*, p. 76.

John R. McCambridge argued the cause for petitioners. With him on the briefs were *Gary M. Elden*, *Jay R. Hoffman*, and *Robert R. Cloar*.

Michael R. Lazerwitz argued the cause for the Securities and Exchange Commission as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Deputy Solicitor General Merrill*, *Daniel L. Goelzer*, *Paul Gonson*, *Jacob H. Stillman*, *Martha H. McNeely*, *Randall W. Quinn*, and *Eva Marie Carney*.

John Matson argued the cause for respondent. With him on the brief were *Carl D. Liggio*, *Kathryn A. Oberly*, and *Fred Lovitch*.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether certain demand notes issued by the Farmers Cooperative of Arkansas and Oklahoma (Co-Op) are "securities" within the meaning of § 3(a)(10) of the Securities Exchange Act of 1934. We conclude that they are.

I

The Co-Op is an agricultural cooperative that, at the time relevant here, had approximately 23,000 members. In order to raise money to support its general business operations, the Co-Op sold promissory notes payable on demand by the holder. Although the notes were uncollateralized and uninsured, they paid a variable rate of interest that was adjusted

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*Briefs of *amicus curiae* urging reversal were filed for the Arkansas Securities Department by *John Steven Clark*, Attorney General of Arkansas; and for the North American Securities Administrators Association, Inc., by *Joseph C. Long*.

monthly to keep it higher than the rate paid by local financial institutions. The Co-Op offered the notes to both members and nonmembers, marketing the scheme as an "Investment Program." Advertisements for the notes, which appeared in each Co-Op newsletter, read in part: "YOUR CO-OP has more than $11,000,000 in assets to stand behind your investments. The Investment is not Federal *[sic]* insured but it is . . . Safe . . . Secure . . . and available when you need it." App. 5 (ellipses in original). Despite these assurances, the Co-Op filed for bankruptcy in 1984. At the time of the filing, over 1,600 people held notes worth a total of $10 million.

After the Co-Op filed for bankruptcy, petitioners, a class of holders of the notes, filed suit against Arthur Young & Co., the firm that had audited the Co-Op's financial statements (and the predecessor to respondent Ernst & Young). Petitioners alleged, *inter alia*, that Arthur Young had intentionally failed to follow generally accepted accounting principles in its audit, specifically with respect to the valuation of one of the Co-Op's major assets, a gasohol plant. Petitioners claimed that Arthur Young violated these principles in an effort to inflate the assets and net worth of the Co-Op. Petitioners maintained that, had Arthur Young properly treated the plant in its audits, they would not have purchased demand notes because the Co-Op's insolvency would have been apparent. On the basis of these allegations, petitioners claimed that Arthur Young had violated the antifraud provisions of the 1934 Act as well as Arkansas' securities laws.

Petitioners prevailed at trial on both their federal and state claims, receiving a $6.1 million judgment. Arthur Young appealed, claiming that the demand notes were not "securities" under either the 1934 Act or Arkansas law, and that the statutes' antifraud provisions therefore did not apply. A panel of the Eighth Circuit, agreeing with Arthur Young on both the state and federal issues, reversed. *Arthur Young & Co.* v. *Reves*, 856 F. 2d 52 (1988). We granted certiorari to address the federal issue, 490 U. S. 1105 (1989), and now reverse the judgment of the Court of Appeals.

II

A

This case requires us to decide whether the note issued by the Co-Op is a "security" within the meaning of the 1934 Act. Section 3(a)(10) of that Act is our starting point:

> "The term 'security' means any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement or in any oil, gas, or other mineral royalty or lease, any collateral-trust certificate, preorganization certificate or subscription, transferable share, investment contract, voting-trust certificate, certificate of deposit, for a security, any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities (including any interest therein or based on the value thereof), or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency, or in general, any instrument commonly known as a 'security'; or any certificate of interest or participation in, temporary or interim certificate for, receipt for, or warrant or right to subscribe to or purchase, any of the foregoing; but shall not include currency or any note, draft, bill of exchange, or banker's acceptance which has a maturity at the time of issuance of not exceeding nine months, exclusive of days of grace, or any renewal thereof the maturity of which is like-wise limited." 48 Stat. 884, as amended, 15 U. S. C. § 78c(a)(10).

The fundamental purpose undergirding the Securities Acts is "to eliminate serious abuses in a largely unregulated securities market." *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 849 (1975). In defining the scope of the market that it wished to regulate, Congress painted with a broad brush. It recognized the virtually limitless scope of human ingenuity, especially in the creation of "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," *SEC* v. *W. J. Howey Co.*, 328 U. S. 293, 299 (1946), and determined that the best way to achieve its goal of protecting investors was "to define 'the term "security" in sufficiently broad and general terms so as to include within that definition the many types of instruments that in our commercial world fall within the ordinary concept of a security.'" *Forman, supra*, at 847–848 (quoting H. R. Rep. No. 85, 73d Cong., 1st Sess., 11 (1933)). Congress therefore did not attempt precisely to cabin the scope of the Securities Acts.[1] Rather, it enacted a definition of "security" sufficiently broad to encompass virtually any instrument that might be sold as an investment.

Congress did not, however, "intend to provide a broad federal remedy for all fraud." *Marine Bank* v. *Weaver*, 455 U. S. 551, 556 (1982). Accordingly, "[t]he task has fallen to the Securities and Exchange Commission (SEC), the body charged with administering the Securities Acts, and ultimately to the federal courts to decide which of the myriad financial transactions in our society come within the coverage of these statutes." *Forman, supra*, at 848. In discharging our duty, we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation. See, *e. g.*, *Tcherepnin* v. *Knight*, 389 U. S. 332, 336 (1967) (in interpreting the term "security," "form should be disregarded for substance and the emphasis should be on economic reality"). Congress' purpose in enacting the securities laws was to regulate *investments*, in whatever form they are made and by whatever name they are called.

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[1] We have consistently held that "[t]he definition of a security in § 3(a)(10) of the 1934 Act . . . is virtually identical [to the definition in the Securities Act of 1933] and, for present purposes, the coverage of the two Acts may be considered the same." *United Housing Foundation, Inc.* v. *Forman*, 421 U. S. 837, 847, n. 12 (1975) (citations omitted). We reaffirm that principle here.

A commitment to an examination of the economic realities of a transaction does not necessarily entail a case-by-case analysis of every instrument, however. Some instruments are obviously within the class Congress intended to regulate because they are by their nature investments. In *Landreth Timber Co.* v. *Landreth*, 471 U. S. 681 (1985), we held that an instrument bearing the name "stock" that, among other things, is negotiable, offers the possibility of capital appreciation, and carries the right to dividends contingent on the profits of a business enterprise is plainly within the class of instruments Congress intended the securities laws to cover. *Landreth Timber* does not signify a lack of concern with economic reality; rather, it signals a recognition that stock is, as a practical matter, always an investment if it has the economic characteristics traditionally associated with stock. Even if sparse exceptions to this generalization can be found, the public perception of common stock as the paradigm of a security suggests that stock, in whatever context it is sold, should be treated as within the ambit of the Acts. *Id.*, at 687, 693.

We made clear in *Landreth Timber* that stock was a special case, explicitly limiting our holding to that sort of instrument. *Id.*, at 694. Although we refused finally to rule out a similar *per se* rule for notes, we intimated that such a rule would be unjustified. Unlike "stock," we said, "'note' may now be viewed as a relatively broad term that encompasses instruments with widely varying characteristics, depending on whether issued in a consumer context, as commercial paper, or in some other investment context." *Ibid.* (citing *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System*, 468 U. S. 137, 149–153 (1984)). While common stock is the quintessence of a security, *Landreth Timber*, *supra*, at 693, and investors therefore justifiably assume that a sale of stock is covered by the Securities Acts, the same simply cannot be said of notes, which are used in a variety of settings, not all of which involve investments. Thus, the phrase "any note" should not be interpreted to mean literally "any note," but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts.[2]

Because the *Landreth Timber* formula cannot sensibly be applied to notes, some other principle must be developed to define the term "note." A majority of the Courts of Appeals that have considered the issue have adopted, in varying forms, "investment versus commercial" approaches that distinguish, on the basis of all of the circumstances surrounding the transactions, notes issued in an investment context (which are "securities") from notes issued in a commercial or consumer context (which are not). See, *e. g.*, *Futura Development Corp.* v. *Centex Corp.*, 761 F. 2d 33, 40–41 (CA1 1985); *McClure* v. *First Nat. Bank of Lubbock, Texas*, 497 F. 2d 490, 492–494 (CA5 1974); *Hunssinger* v. *Rockford Business Credits, Inc.*, 745 F. 2d 484, 488 (CA7 1984); *Holloway* v. *Peat, Marwick, Mitchell & Co.*, 879 F. 2d 772, 778–779 (CA10 1989), cert. pending No. 89–532.

The Second Circuit's "family resemblance" approach begins with a presumption that *any* note with a term of more than nine months is a "security." See, *e. g.*, *Exchange Nat. Bank of Chicago* v. *Touche Ross & Co.*, 544 F. 2d 1126, 1137 (CA2 1976). Recognizing that not all notes are securities, however, the Second Circuit has also devised a list of notes that it has decided are obviously not securities. Accordingly, the "family resemblance" test permits an issuer to rebut the presumption that a note is a security if it can show that the note in question "bear[s] a strong family resemblance" to an item on the judicially crafted list of exceptions, *id.*, at 1137–1138, or convinces the court to add a new instrument to the list, see, *e. g.*, *Chemical Bank* v. *Arthur Andersen & Co.*, 726 F. 2d 930, 939 (CA2 1984).

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[2] An approach founded on economic reality rather than on a set of *per se* rules is subject to the criticism that whether a particular note is a "security" may not be entirely clear at the time it is issued. Such an approach has the corresponding advantage, though, of permitting the SEC and the courts sufficient flexibility to ensure that those who market investments are not able to escape the coverage of the Securities Acts by creating new instruments that would not be covered by a more determinate definition. One could question whether, at the expense of the goal of clarity, Congress overvalued the goal of avoiding manipulation by the clever and dishonest. If Congress erred, however, it is for that body, and not this Court, to correct its mistake.

In contrast, the Eighth and District of Columbia Circuits apply the test we created in *SEC* v. *W. J. Howey Co.*, 328 U. S. 293 (1946), to determine whether an instrument is an "investment contract" to the determination whether an instrument is a "note." Under this test, a note is a security only if it evidences "(1) an investment; (2) in a common enterprise; (3) with a reasonable expection of profits; (4) to be derived from the entrepreneurial or managerial efforts of others." 856 F. 2d, at 54 (case below). Accord, *Baurer* v. *Planning Group, Inc.*, 215 U. S. App. D. C. 384, 391–393, 669 F. 2d 770, 777–779 (1981). See also *Underhill* v. *Royal*, 769 F. 2d 1426, 1431 (CA9 1985) (setting forth what it terms a "risk capital" approach that is virtually identical to the *Howey* test).

We reject the approaches of those courts that have applied the *Howey* test to notes; *Howey* provides a mechanism for determining whether an instrument is an "investment contract." The demand notes here may well not be "investment contracts," but that does not mean they are not "notes." To hold that a "note" is not a "security" unless it meets a test designed for an entirely different variety of instrument "would make the Acts' enumeration of many types of instruments superfluous," *Landreth Timber*, 471 U. S., at 692, and would be inconsistent with Congress' intent to regulate the entire body of instruments sold as investments, see *supra*, at 60–62.

The other two contenders—the "family resemblance" and "investment versus commercial" tests—are really two ways of formulating the same general approach. Because we think the "family resemblance" test provides a more promising framework for analysis, however, we adopt it. The test begins with the language of the statute; because the Securities Acts define "security" to include "any note," we begin with a presumption that every note is a security.[3] We nonetheless recognize that this presumption cannot be irrebuttable. As we have said, *supra*, at 61, Congress was concerned with regulating the investment market, not with creating a general federal cause of action for fraud. In an attempt to give more content to that dividing line, the Second Circuit has identified a list of instruments commonly denominated "notes" that nonetheless fall without the "security" category. See *Exchange Nat. Bank*, *supra*, at 1138 (types of notes that are not "securities" include "the note delivered in consumer financing, the note secured by a mortgage on a home, the short-term note secured by a lien on a small business or some of its assets, the note evidencing a 'character' loan to a bank customer, short-term notes secured by an assignment of accounts receivable, or a note which simply formalizes an open-account debt incurred in the ordinary course of business (particularly if, as in the case of the customer of a broker, it is collateralized)"); *Chemical Bank*, *supra*, at 939 (adding to list "notes evidencing loans by commercial banks for current operations").

We agree that the items identified by the Second Circuit are not properly viewed as "securities." More guidance, though, is needed. It is impossible to make any meaningful inquiry into whether an instrument bears a "resemblance" to one of the instruments identified by the Second Circuit without specifying what it is about *those* instruments that makes *them* non-"securities." Moreover, as the Second Circuit itself has noted, its list is "not graven in stone," 726 F. 2d, at 939, and is therefore capable of expansion. Thus, some standards must be developed for determining when an item should be added to the list.

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[3] The Second Circuit's version of the family resemblance test provided that only notes *with a term of more than nine months* are presumed to be "securities." See *supra*, at 63. No presumption of any kind attached to notes of less than nine months' duration. The Second Circuit's refusal to extend the presumption to *all* notes was apparently founded on its interpretation of the statutory exception for notes with a maturity of nine months or less. Because we do not reach the question of how to interpret that exception, see *infra*, at 71, we likewise express no view on how that exception might affect the presumption that a note is a "security."

An examination of the list itself makes clear what those standards should be. In creating its list, the Second Circuit was applying the same factors that this Court has held apply in deciding whether a transaction involves a "security." First, we examine the transaction to assess the motivations that would prompt a reasonable seller and buyer to enter into it. If the seller's purpose is to raise money for the general use of a business enterprise or to finance substantial investments and the buyer is interested primarily in the profit the note is expected to generate, the instrument is likely to be a "security." If the note is exchanged to facilitate the purchase and sale of a minor asset or consumer good, to correct for the seller's cash-flow difficulties, or to advance some other commercial or consumer purpose, on the other hand, the note is less sensibly described as a "security." See, *e. g.*, *Forman*, 421 U. S., at 851 (share of "stock" carrying a right to subsidized housing not a security because "the inducement to purchase was solely to acquire subsidized low-cost living space; it was not to invest for profit"). Second, we examine the "plan of distribution" of the instrument, *SEC* v. *C. M. Joiner Leasing Corp.*, 320 U. S. 344, 353 (1943), to determine whether it is an instrument in which there is "common trading for speculation or investment," *id.*, at 351. Third, we examine the reasonable expectations of the investing public: The Court will consider instruments to be "securities" on the basis of such public expectations, even where an economic analysis of the circumstances of the particular transaction might suggest that the instruments are not "securities" as used in that transaction. Compare *Landreth Timber*, 471

U. S., at 687, 693 (relying on public expectations in holding that common stock is always a security), with *id.*, at 697–700 (STEVENS, J., dissenting) (arguing that sale of business to single informed purchaser through stock is not within the purview of the Acts under the economic reality test). See also *Forman, supra*, at 851. Finally, we examine whether some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, thereby rendering application of the Securities Acts unnecessary. See, *e. g.*, *Marine Bank*, 455 U. S., at 557–559, and n. 7.

We conclude, then, that in determining whether an instrument denominated a "note" is a "security," courts are to apply the version of the "family resemblance" test that we have articulated here: A note is presumed to be a "security," and that presumption may be rebutted only by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument. If an instrument is not sufficiently similar to an item on the list, the decision whether another category should be added is to be made by examining the same factors.

B

Applying the family resemblance approach to this case, we have little difficulty in concluding that the notes at issue here are "securities." Ernst & Young admits that "a demand note does not closely resemble any of the Second Circuit's family resemblance examples." Brief for Respondent 43. Nor does an examination of the four factors we have identified as being relevant to our inquiry suggest that the demand notes here are not "securities" despite their lack of similarity to any of the enumerated categories. The Co-Op sold the notes in an effort to raise capital for its general business operations, and purchasers bought them in order to earn a profit in the form of interest.[4] Indeed, one of the primary inducements offered purchasers was an interest rate constantly revised to keep it slightly above the rate paid by local banks and savings and loans. From both sides, then, the transaction is most naturally conceived as an investment in a business enterprise rather than as a purely commercial or consumer transaction.

As to the plan of distribution, the Co-Op offered the notes over an extended period to its 23,000 members, as well as to nonmembers, and more than 1,600 people held notes when the Co-Op filed for bankruptcy. To be sure, the notes were not traded on an exchange. They were, however, offered and sold to a broad segment of the public, and that is all we have held to be necessary to establish the requisite "common trading" in an instrument. See, *e. g.*, *Landreth Timber*, *supra* (stock of closely held corporation not traded on any exchange held to be a "security"); *Tcherepnin*, 389 U. S., at 337 (nonnegotiable but transferable "withdrawable capital shares" in savings and loan association held to be a "security"); *Howey*, 328 U. S., at 295 (units of citrus grove and maintenance contract "securities" although not traded on exchange).

The third factor—the public's reasonable perceptions—also supports a finding that the notes in this case are "securities." We have consistently identified the fundamental essence of a

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[4] We emphasize that by "profit" in the context of notes, we mean "a valuable return on an investment," which undoubtedly includes interest. We have, of course, defined "profit" more restrictively in applying the *Howey* test to what are claimed to be "investment contracts." See, *e. g.*, *Forman*, 421 U. S., at 852 ("[P]rofit" under the *Howey* test means either "capital appreciation" or "a participation in earnings"). To apply this restrictive definition to the determination whether an instrument is a "note" would be to suggest that notes paying a rate of interest not keyed to the earning of the enterprise are not "notes" within the meaning of the Securities Acts. Because the *Howey* test is irrelevant to the issue before us today, see *supra*, at 64, we decline to extend its definition of "profit" beyond the realm in which that definition applies.

"security" to be its character as an "investment." See *supra*, at 61, 65. The advertisements for the notes here characterized them as "investments," see *supra*, at 59, and there were no countervailing factors that would have led a reasonable person to question this characterization. In these circumstances, it would be reasonable for a prospective purchaser to take the Co-Op at its word.

Finally, we find no risk-reducing factor to suggest that these instruments are not in fact securities. The notes are uncollateralized and uninsured. Moreover, unlike the certificates of deposit in *Marine Bank*, *supra*, at 557–558, which were insured by the Federal Deposit Insurance Corporation and subject to substantial regulation under the federal banking laws, and unlike the pension plan in *Teamsters* v. *Daniel*, 439 U. S. 551, 569–570 (1979), which was comprehensively regulated under the Employee Retirement Income Security Act of 1974, 88 Stat. 829, 29 U. S. C. § 1001 *et seq.* (1982 ed.), the notes here would escape federal regulation entirely if the Acts were held not to apply.

The court below found that "[t]he demand nature of the notes is very uncharacteristic of a security," 856 F. 2d, at 54, on the theory that the virtually instant liquidity associated with demand notes is inconsistent with the risk ordinarily associated with "securities." This argument is unpersuasive. Common stock traded on a national exchange is the paradigm of a security, and it is as readily convertible into cash as is a demand note. The same is true of publicly traded corporate bonds, debentures, and any number of other instruments that are plainly within the purview of the Acts. The demand feature of a note does permit a holder to eliminate risk quickly by making a demand, but just as with publicly traded stock, the liquidity of the instrument does not eliminate risk altogether. Indeed, publicly traded stock is even more readily liquid than are demand notes, in that a demand only eliminates risk when, and if, payment is made, whereas the sale of a share of stock through a national exchange and the receipt of the proceeds usually occur simultaneously.

We therefore hold that the notes at issue here are within the term "note" in § 3(a)(10).

III

Relying on the exception in the statute for "any note . . . which has a maturity at the time of issuance of not exceeding nine months," 15 U. S. C. § 78c(a)(10), respondent contends that the notes here are not "securities," even if they would otherwise qualify. Respondent cites Arkansas cases standing for the proposition that, in the context of the state statute of limitations, "[a] note payable on demand is due immediately." See, *e. g.*, *McMahon* v. *O'Keefe*, 213 Ark. 105, 106, 209 S. W. 2d 449, 450 (1948) (statute of limitations is triggered by the date of issuance rather than by date of first demand). Respondent concludes from this rule that the "maturity" of a demand note within the meaning of § 3(a)(10) is immediate, which is, of course, less than nine months. Respondent therefore contends that the notes fall within the plain words of the exclusion and are thus not "securities."

Petitioners counter that the "plain words" of the exclusion should not govern. Petitioners cite the legislative history of a similar provision of the 1933 Act, 48 Stat. 76, 15 U. S. C. § 77c(a)(3), for the proposition that the purpose of the exclusion is to except from the coverage of the Acts only commercial paper—short-term, high quality instruments issued to fund current operations and sold only to highly sophisticated investors. See S. Rep. No. 47, 73d Cong., 1st Sess., 3–4 (1933); H. R. Rep. No. 85, 73d Cong., 1st Sess., 15 (1933). Petitioners also emphasize that this Court has repeatedly held (see *supra*, at 60–63) that the plain words of the definition of a "security" are not dispositive, and that we consider the economic reality of the transaction to determine whether Congress intended the Securities Acts to apply. Petitioners therefore argue, with some force, that reading the exception for short-term notes to exclude from the Acts' coverage investment notes of less than nine months' duration would be inconsistent with Congress' evident desire to permit the SEC and the courts flexibility to ensure that the Acts are not manipulated to investors' detriment. If petitioners are correct that the exclusion is intended to cover only commercial paper, these notes, which were sold in a large scale offering to unsophisticated members of the public, plainly should not fall within the exclusion.

We need not decide, however, whether petitioners' interpretation of the exception is correct, for we conclude that even if we give literal effect to the exception, the notes do not fall within its terms.

Respondent's contention that the demand notes fall within the "plain words" of the statute rests entirely upon the premise that Arkansas' statute of limitations for suits to collect demand notes is determinative of the "maturity" of the notes, as that term is used in the *federal* Securities Acts. The "maturity" of the notes, however, is a question of federal law. To regard States' statutes of limitations law as controlling the scope of the Securities Acts would be to hold that a particular instrument is a "security" under the 1934 Act in some States, but that the same instrument is not a "security" in others. Compare *McMahon*, *supra*, at 106 (statute runs from date of note), with 42 Pa. Cons. Stat. § 5525(7) (1988) (statute runs "from the later of either demand or any payment of principal of or interest on the instrument"). We are unpersuaded that Congress intended the Securities Acts to apply differently to the same transactions depending on the accident of which State's law happens to apply.

The CHIEF JUSTICE's argument in partial dissent is but a more artful statement of respondent's contention, and it suffers from the same defect. The CHIEF JUSTICE begins by defining "maturity" to mean the time when a note becomes due. *Post*, at 77 (quoting Black's Law Dictionary 1170 (3d ed. 1933)). Because a demand note is "immediately 'due' such that an action could be brought at any time without any other demand than the suit," *post*, at 77, the CHIEF JUSTICE concludes that a demand note is due immediately for purposes of the federal securities laws. Even if the CHIEF JUSTICE is correct that the "maturity" of a note corresponds to the time at which it "becomes due," the authority he cites for the proposition that, as a matter of federal law, a demand note "becomes due" immediately (as opposed to when demand is made or expected to be made) is no more dispositive than is Arkansas case law. The CHIEF JUSTICE's primary source of authority is a treatise regarding the *state* law of negotiable instruments, particularly the Uniform Negotiable Instruments Law. See M. Bigelow, Law of Bills, Notes, and Checks v–vii (3d. ed. W. Lile rev. 1928). The quotation upon which the CHIEF JUSTICE relies is concerned with articulating the general *state*-law rule regarding when suit may be filed. The only other authority the CHIEF JUSTICE cites makes plain that state-law rules governing when a demand note becomes due are significant only in that they control the date on which statutes of limitation begins to run and whether demand must precede suit. See 8 C. J., Bills and Notes § 602, p. 406 (1916). Indeed, the treatise suggests that States were no more unanimous on those questions in 1933 than they are now. *Ibid.* In short, the dissent adds nothing to respondent's argument other than additional authority for what "maturity" means in certain state-law contexts. The dissent provides no argument for its implicit, but essential, premise that state rules concerning the proper method of collecting a debt control the resolution of the federal question before us.

Neither the law of Arkansas nor that of any other State provides an answer to the federal question, and as a matter of federal law, the words of the statute are far from "plain" with regard to whether demand notes fall within the exclusion. If it is plausible to regard a demand note as having an immediate maturity because demand *could* be made immediately, it is also plausible to regard the maturity of a demand note as being in excess of nine months because demand *could* be made many years or decades into the future. Given this ambiguity, the exclusion must be interpreted in accordance with its purpose. As we have said, we will assume for argument's sake that petitioners are incorrect in their view that the exclusion is intended to exempt only commercial paper. Respondent presents no competing view to explain why Congress would have enacted respondent's version of the exclusion, however, and the only theory that we can imagine that would support respondent's interpretation is that Congress intended to create a bright-line rule exempting from the 1934 Act's coverage *all* notes of less than nine months' duration, because short-term notes are, as a general rule, sufficiently safe that the Securities Acts need not apply. As we have said, however, demand notes do not necessarily have short terms. In light of Congress' broader purpose in the Acts of ensuring that investments of all descriptions be regulated to prevent fraud and abuse, we interpret the exception not to cover the demand notes at issue here. Although the result might be different if the design of the transaction suggested that both parties contemplated that demand would be made within the statutory period, that is not the case before us.

IV

For the foregoing reasons, we conclude that the demand notes at issue here fall under the "note" category of instruments that are "securities" under the 1933 and 1934 Acts. We also conclude that, even under respondent's preferred approach to § 3(a)(10)'s exclusion for short-term notes, these demand notes do not fall within the exclusion. Accordingly, we reverse the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

So ordered.

JUSTICE STEVENS, concurring.

While I join the Court's opinion, an important additional consideration supports my conclusion that these notes are securities notwithstanding the statute's exclusion for currency and commercial paper that has a maturity of no more than nine months. See 15 U. S. C. § 78c(a)(10) (§ 3(a)(10) of the Securities Exchange Act of 1934). The Courts of Appeals have been unanimous in rejecting a literal reading of that exclusion. They have instead concluded that "when Congress spoke of notes with a maturity not exceeding nine months, it meant commercial paper, not investment securities." *Sanders* v. *John Nuveen & Co.*, 463 F. 2d 1075, 1080 (CA7), cert. denied, 409 U. S. 1009 (1972). This view was first set out in an opinion by Judge Sprecher, and soon thereafter endorsed by Chief Judge Friendly. *Zeller* v. *Bogue Electric Mfg. Corp.*, 476 F. 2d 795, 800 (CA2), cert. denied, 414 U. S. 908 (1973). Others have adopted the same position since. See, *e. g.*, *McClure* v. *First Nat. Bank of Lubbock, Texas*, 497 F. 2d 490, 494–495 (CA5 1974), cert. denied, 420 U. S. 930 (1975); *Holloway* v. *Peat, Marwick, Mitchell & Co.*, 879 F. 2d 772, 778 (CA10 1989); *Baurer* v. *Planning Group, Inc.*, 215 U. S. App. D. C. 384, 389–391, 669 F. 2d 770, 775–777 (1981).

In my view such a settled construction of an important federal statute should not be disturbed unless and until Congress so decides. "[A]fter a statute has been construed, either by this Court or by a consistent course of decision by other federal judges and agencies, it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself." *Shearson/American Express Inc.* v. *McMahon*, 482 U. S. 220, 268 (1987) (STEVENS, J., concurring in part and dissenting in part); see also *Chesapeake & Ohio R. Co.* v. *Schwalb*, 493 U. S. 40, 51 (1989) (STEVENS, J., concurring in judgment). What I have said before of taxation applies equally to securities regulation: "there is a strong interest in enabling" those affected "to predict the legal consequences of their proposed actions, and there is an even stronger general interest in ensuring that the responsibility for making changes in settled law rests squarely on the shoulders of Congress." *Commissioner* v. *Fink*, 483 U. S. 89, 101 (1987) (dissenting opinion). Past errors may in rare cases be "sufficiently blatant" to overcome the "'strong presumption of continued validity that adheres in the judicial interpretation of a statute,'" but this is not such a case. *Id.*, at 103 (quoting *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U. S. 409, 424 (1986)).

Indeed, the agreement among the Courts of Appeals is made all the more impressive in this case because it is buttressed by the views of the Securities and Exchange Commission. See Securities Act Release No. 33–4412, 26 Fed. Reg. 9158 (1961) (construing § 3(a)(3) of the Securities Act of 1933, the 1933 Act's counterpart to § 3(a)(10) of the 1934 Act). We have ourselves referred to the exclusion for notes with a maturity not exceeding nine months as an exclusion for "commercial paper." *Securities Industry Assn.* v. *Board of Governors of Federal Reserve System*, 468 U. S. 137, 150–152 (1984). Perhaps because the restriction of the exclusion to commercial paper is so well established, respondents admit that they did not even argue before the Court of Appeals that their notes were covered by the exclusion. A departure from this reliable consensus would upset the justified expectations of both the legal and investment communities.

Moreover, I am satisfied that the interpretation of the statute expounded by Judge Sprecher and Judge Friendly was entirely correct. As Judge Friendly has observed, the exclusion for short-term notes must be read in light of the prefatory language in § 2 of the 1933 Act and § 3 of the 1934 Act. See *Exchange Nat. Bank of Chicago* v. *Touche Ross & Co.*, 544 F. 2d 1126, 1131–1132, and nn. 7–10 (CA2 1976). Pursuant to that language, definitions specified by the Acts may not apply if the "context otherwise requires." *Marine Bank* v. *Weaver*, 455 U. S. 551, 556 (1982) (the "broad statutory definition is preceded, however, by the statement that the terms mentioned are not to be considered securities if 'the context otherwise requires . . .'"); accord, *Landreth Timber*

Co. v. *Landreth*, 471 U. S. 681, 697–698 (1985) (STEVENS, J., dissenting). The context clause thus permits a judicial construction of the statute which harmonizes the facially rigid terms of the 9-month exclusion with the evident intent of Congress. *Exchange Nat. Bank*, 544 F. 2d, at 1132–1133. The legislative history of § 3(a)(3) of the 1933 Act indicates that the exclusion was intended to cover only commercial paper, and the SEC has so construed it. *Sanders*, 463 F. 2d, at 1079, and nn. 12–13; *Zeller*, 476 F. 2d, at 799–800, and n. 6. As the Courts of Appeals have agreed, there is no apparent reason to construe § 3(a)(10) of the 1934 Act differently. *Sanders*, 463 F. 2d, at 1079–1080, and n. 15; *Zeller*, 476 F. 2d, at 800. See also Comment, The Commercial Paper Market and the Securities Acts, 39 U. Chi. L. Rev. 362, 398 (1972).

For these reasons and those stated in the opinion of the Court, I conclude that the notes issued by respondents are securities within the meaning of the 1934 Act.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, concurring in part and dissenting in part.

I join Part II of the Court's opinion, but dissent from Part III and the statements of the Court's judgment in Parts I and IV. In Part III, the Court holds that these notes were not covered by the statutory exemption for "any note . . . which has a maturity at the time of issuance of not exceeding nine months." Treating demand notes as if they were a recent development in the law of negotiable instruments, the Court says "if it is plausible to regard a demand note as having an immediate maturity because demand *could* be made immediately, it is also plausible to regard the maturity of a demand note as being in excess of nine months because demand *could* be made many years or decades into the future. Given this ambiguity, the exclusion must be interpreted in accordance with its purpose." *Ante*, at 72–73.

But the terms "note" and "maturity" did not spring full blown from the head of Congress in 1934. Neither are demand notes of recent vintage. "Note" and "maturity" have been terms of art in the legal profession for centuries, and a body of law concerning the characteristics of demand notes, including their maturity, was in existence at the time Congress passed the 1934 Act.

In construing any terms whose meanings are less than plain, we depend on the common understanding of those terms at the time of the statute's creation. See *Gilbert* v. *United States*, 370 U. S. 650, 655 (1962) ("[I]n the absence of anything to the contrary it is fair to assume that Congress use[s a] word in [a] statute in its common-law sense"); *Roadway Express, Inc.* v. *Piper*, 447 U. S. 752, 759 (1980) (in construing a word in a statute, "we may look to the contemporaneous understanding of the term"); *Standard Oil Co. of New Jersey* v. *United States*, 221 U. S. 1, 59 (1911) (common-law meaning "presumed" to have been Congress' intent); see also *Lorillard* v. *Pons*, 434 U. S. 575, 583 (1978); *United States* v. *Spencer*, 839 F. 2d 1341, 1344 (CA9 1988). Contemporaneous editions of legal dictionaries defined "maturity" as "[t]he time when a . . . note becomes due." Black's Law Dictionary 1170 (3d ed. 1933); Cyclopedic Law Dictionary 649 (2d ed. 1922). Pursuant to the dominant consensus in the case law, instruments payable on demand were considered immediately "due" such that an action could be brought at any time without any other demand than the suit. See, *e. g.*, M. Bigelow, Law of Bills, Notes, and Checks § 349, p. 265 (3d ed. W. Lile rev. 1928); 8 C. J., Bills and Notes § 602, p. 406, and n. 83 (1916). According to Bigelow:

> "So far as maker and acceptor are concerned, paper payable . . . 'on demand' is due from the moment of its delivery, and payment may be required on any business day, including the day of its issue, within the statute of limitations. In other words, as to these parties *the paper is at maturity all the time*, and no demand of payment is nec-

> essary before suit thereon." Bigelow, *supra*, § 349, at 265 (emphasis added; emphasis in original deleted; footnote omitted).

To be sure, demand instruments were considered to have "the peculiar quality of having two maturity dates—one for the purpose of holding to his obligation the party primarily liable (*e. g.* maker), and the other for enforcing the contracts of parties secondarily liable (*e. g.* drawer and indorsers)." Bigelow, *supra*, § 350, at 266 (emphasis omitted). But only the rule of immediate maturity respecting makers of demand notes has any bearing on our examination of the exemption; the language in the Act makes clear that it is the "maturity at time of issuance" with which we are concerned. 15 U. S. C. § 78c(a)(10). Accordingly, in the absence of some compelling indication to the contrary, the maturity date exemption must encompass demand notes because they possess "maturity at the time of issuance of not exceeding nine months." *

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*Reference to the state common law of negotiable instruments does not suggest that "Congress intended the Securities Acts to apply differently to the same transactions depending on the accident of which State's law happens to apply." See *ante*, at 71. Rather, in the absence of a *federal* law of negotiable instruments, cf. *De Sylva* v. *Ballentine*, 351 U. S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern"), or other alternative sources for discerning the applicability of the statutory term "maturity" to demand notes, we are dependent on the state common law at the time of the Act's creation as a basis for a nationally uniform answer to this "federal question." As we said in *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U. S. 30, 47 (1989):

> "That we are dealing with a uniform federal rather than a state definition does not, of course, prevent us from drawing on general state-law principles to determine 'the ordinary meaning of the words used.' Well-settled state law can inform our understanding of what Congress had in mind when it employed a term it did not define."

See also 2A C. Sutherland on Statutory Construction § 50.04, pp. 438–439 (4th ed. 1984) (noting the "utility" found by various courts, including this Court, in "examining a federal statute with reference to the common law of the various states as it existed at the time the statute was enacted"). In 1934, when this statute was enacted, as is true today, the American law of

Petitioners and the lower court decisions cited by JUSTICE STEVENS rely, virtually exclusively, on the legislative history of § 3(a)(3) of the 1933 Act for the proposition that the term "any note" in the exemption in § 3(a)(10) of the 1934 Act encompass only notes having the character of short-term "commercial paper" exchanged among sophisticated traders. I am not altogether convinced that the legislative history of § 3(a)(3) supports that interpretation even with respect to the term "any note" in the exemption in § 3(a)(3), and to bodily transpose that legislative history to another statute has little to commend it as a method of statutory construction.

The legislative history of the 1934 Act—under which this case arises—contains nothing which would support a restrictive reading of the exemption in question. Nor does the legislative history of § 3(a)(3) of the 1933 Act support the asserted limited construction of the exemption in § 3(a)(10) of the 1934 Act. Though the two most pertinent sources of congressional commentary on § 3(a)(3)—H. R. Rep. No. 85, 73d Cong., 1st Sess., 15 (1933) and S. Rep. No. 47, 73d Cong., 1st Sess., 3–4 (1933)—do suggest an intent to limit § 3(a)(3)'s exemption to short-term commercial paper, the references in those Reports to commercial paper simply did not survive in the language of the enactment. Indeed, the Senate Report stated "[n]otes, drafts, bills of exchange, and bankers' acceptances *which are commercial paper* and arise out of current *commercial, agricultural, or industrial* transactions, *and which are not intended to be marketed to the public*, are exempted. . . ." S. Rep. No. 47, *supra*, at 3–4 (emphasis added). Yet the provision enacted in § 3(a)(3)

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negotiable instruments was found in the state-court reporters. Though the States were not unanimous on the issue of the time of maturity of demand notes, virtually every matter of state common law evokes a majority and minority position. The vast number of courts that adopted the majority view of immediate maturity, see 8 C. J., Bills and Notes § 602, p. 406, n. 83 (1916), compels the conclusion that the immediate maturity rule constituted "well-settled state law" or a "general state-law principle" at the time § 3(a)(10) was enacted.

of the 1933 Act exempts "*[a]ny* note, draft, bill of exchange, or banker's acceptance which arises out of a current transaction or the proceeds of which have been or are to be used for current transactions, and which has a maturity at the time of issuance of not exceeding nine months . . . ." 15 U. S. C. § 77c(a)(3) (emphasis added).

Such broadening of the language in the enacted version of § 3(a)(3), relative to the prototype from which it sprang, cannot easily be dismissed in interpreting § 3(a)(3). *A fortiori*, the legislative history's restrictive meaning cannot be imputed to the facially broader language in a different provision of another Act. Although I do not doubt that both the 1933 and 1934 Act exemptions encompass short-term commercial paper, the expansive language in the statutory provisions is strong evidence that, in the end, Congress meant for commercial paper merely to be a subset of a larger class of exempted short-term instruments.

The plausibility of imputing a restrictive reading to § 3(a)(10) from the legislative history of § 3(a)(3) is further weakened by the imperfect analogy between the two provisions in terms of both phraseology and nature. Section 3(a)(10) lacks the cryptic phrase in § 3(a)(3) which qualifies the class of instruments eligible for exemption as those arising "out of . . . current transaction[s] or the proceeds of which have been or are to be used for current transactions . . . ." While that passage somehow may strengthen an argument for limiting the exemption in § 3(a)(3) to commercial paper, its absence in § 3(a)(10) conversely militates against placing the same limitation thereon.

The exemption in § 3(a)(3) excepts the short-term instruments it covers solely from the registration requirements of the 1933 Act. The same instruments are not exempted from the 1933 Act's antifraud provisions. Compare 15 U. S. C. § 77c(a)(3) with 15 U. S. C. §§ 77*l*(2) and 77q(c); see also *Securities Industry Assn.* v. *Board of Governors of Federal*

Reserve System, 468 U. S. 137, 151 (1984). By contrast, the exemption in § 3(a)(10) of the 1934 Act exempts instruments encompassed thereunder from the entirety of the coverage of the 1934 Act including, conspicuously, the Act's antifraud provisions.

JUSTICE STEVENS argues that the suggested limited reading of the exemption in § 3(a)(10) of the 1934 Act "harmonizes" the plain terms of that provision with the legislative history of the 1933 Act. *Ante*, at 76. In his view, such harmony is required by the "context clause" at the beginning of the 1934 Act's general definition of "security." It seems to me, instead, that harmony is called for primarily between § 3(a)(10)'s general definition and its specific exemption. The fairest reading of the exemption in light of the context clause is that the situation described in the exemption—notes with maturities at issue of less than nine months— is one contextual exception Congress especially wanted courts to recognize. Such a reading does not render the context clause superfluous; it merely leaves it to the judiciary to flesh out additional "context clause" exceptions.

JUSTICE STEVENS also states that we have previously referred to the exemption in § 3(a)(10) as an exclusion for commercial paper. *Ante*, at 76 (citing *Securities Industry Assn.*, *supra*, at 150–152). In the *Securities Industry Assn.* dictum, however, we described the exemption in § 3(a)(10) merely as "encompass[ing]" commercial paper and in no way concluded that the exemption was limited to commercial paper. See 468 U. S., at 150–151. Indeed, in *Securities Industry Assn.*, our purpose in referring to § 3(a)(10) was to assist our determination whether commercial paper was even *included* in the 73d Congress' use of the words "notes . . . or other securities" in the Glass-Steagall Banking Act of 1933.

In sum, there is no justification for looking beyond the plain terms of § 3(a)(10), save for ascertaining the meaning of "maturity" with respect to demand notes. That inquiry reveals that the Co-Op's demand notes come within the purview of the section's exemption for short-term securities. I would therefore affirm the judgment of the Court of Appeals, though on different reasoning.

SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. *v.* EVERHART ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88–1323. Argued November 27, 1989—Decided February 21, 1990

The Social Security Act requires the Secretary of Health and Human Services, when he "finds that more or less than the correct amount" of "payment" has been made under the Old-Age, Survivors and Disability Insurance program, or of "benefits" has been paid under the Supplemental Security Income program, to make "proper adjustment or recovery." If less than the correct amount has been paid, the Secretary shall pay the balance due; if more than the correct amount has been paid, the Secretary shall reduce future payment or obtain a refund from the beneficiary. The Act prohibits, however, "adjustment of payments to, or recovery . . . from, any person who is without fault," if such adjustment or recovery would defeat the Act's purposes or be against equity and good conscience. *Califano* v. *Yamasaki*, 442 U. S. 682, 697, interpreted that limitation as entitling the beneficiary to an oral hearing on waiver of recoupment. Pursuant to his authority to "fin[d] [whether] more or less than the correct amount" of payment has been made, and under his general rulemaking authority, the Secretary promulgated "netting" regulations. Under these regulations, the Secretary calculates the difference between the amount due and the amount paid for the period beginning with the first month for which there was a payment error and ending with the month of the "initial determination." If the beneficiary was overpaid in certain months and underpaid in others, the Secretary will net the errors (*i. e.*, calculate the difference between the underpayments and the overpayments) and treat the netted amount as an overpayment or underpayment, as the case may be, for purposes of adjustment or recovery. In this case, after the Secretary made both underpayments and overpayments to each respondent, he netted the errors, paid the net underpayments, and offered recoupment waiver hearings as to the net overpayments. The District Court granted summary judgment to respondents in their ensuing lawsuit, ruling that the regulations violated the Act. The Court of Appeals affirmed.

Held: The netting regulations are facially valid. Pp. 88–95.

(a) The regulations are based on a permissible construction of the Act. The Act authorizes the Secretary to determine whether "more or less than the correct amount" has been paid; and the "correct amount" can reasonably be construed to mean the net amount owing as of the date of the determination, rather than the amount owing each month. The Act refers to the correct amount "of payment," not of "any payment" (as it does elsewhere), which suggests computation on a multipayment basis. Nor does the restriction on "adjustment or recovery" of overpayments foreclose the netting regulations. These terms do not necessarily embrace all collection methods. The Secretary has reasonably interpreted "adjustment" to mean a reduction in future payments, and "recovery" to mean refund. Pp. 89–93.

(b) The method of computing the netting period does not make the regulations arbitrary and capricious. The inevitable delay between the discovery that something is amiss and the formal "initial determination" of error (which closes the netting period) is necessary to avoid spur-of-the-moment decisions. The Secretary's regulations limit delay, and the hypothesis that the Secretary will deliberately delay to net-in additional underpayments is implausible. Respondents' alternative regime of separate accounting would increase the administrative burden, and their alternative suggestion of delayed reimbursement of underpayments does not address the alleged delay problem. Pp. 93–95.

853 F. 2d 1532, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and KENNEDY, JJ., joined, *post*, p. 96.

Amy L. Wax argued the cause *pro hac vice* for petitioners. With her on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General Schiffer*, *Deputy Solicitor General Merrill*, and *William Kanter*.

Linda J. Olson argued the cause for respondents. With her on the brief were *R. Eric Solem* and *Daniel M. Taubman*.*

JUSTICE SCALIA delivered the opinion of the Court.

If the Secretary of Health and Human Services determines that a beneficiary has received "more or less than the correct amount of payment," the Social Security Act requires him to effect "proper adjustment or recovery," subject to certain restrictions in the case of overpayments. This case requires us to decide whether the Secretary's so-called "netting" regulations, under which he calculates the difference between past underpayments and past overpayments, are merely a permissible method of determining whether "more or less than the correct amount of payment" was made, or are instead, as to netted-out overpayments, an "adjustment or recovery" that must comply with procedures for recovery of overpayments imposed by the Act.

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* *Cathy Ventrell-Monsees* and *Peter Komlos-Hrobsky* filed a brief for the American Association of Retired Persons et al. as *amici curiae* urging affirmance.

I

Two statutory benefit programs established by the Social Security Act (Act) are involved: the Old-Age, Survivors, and Disability Insurance program (OASDI), 53 Stat. 1362, as amended, 42 U. S. C. § 401 *et seq.* (1982 ed. and Supp. V), and the Supplemental Security Income program (SSI), 86 Stat. 1465, 42 U. S. C. § 1381 *et seq.* (1982 ed. and Supp. V). Millions of Americans receive benefits under these programs; inevitably, some beneficiaries occasionally receive more than their entitlement, and others less. The OASDI program provides the following procedure for correcting such errors:

> "Whenever the Secretary finds that more or less than the correct amount of payment has been made to any person under this subchapter, proper adjustment or recovery shall be made, under regulations prescribed by the Secretary, as follows:
>
> "(A) With respect to payment to a person of more than the correct amount, the Secretary shall decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount, or shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis of the payments to such over-

> paid person, or shall apply any combination of the foregoing. . . .
>
> "(B) With respect to payment to a person of less than the correct amount, the Secretary shall make payment of the balance of the amount due such underpaid person . . . ." Act §§204(a)(1)(A), (B); 42 U. S. C. §§404(a)(1)(A), (B) (1982 ed., Supp. V).

As to overpayments, the Act provides:

> "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." Act §204(b); 42 U. S. C. §404(b) (1982 ed.).

The provisions regulating payment errors in the SSI program are substantially similar.* *Califano* v. *Yamasaki*, 442 U. S. 682, 697 (1979), held that the limitation on adjustment or recovery of overpayments imposed by §204(b) of the Act gives recipients the right to an oral hearing at which they may attempt to convince the Secretary to waive recoupment.

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* "(A) Whenever the Secretary finds that more or less than the correct amount of benefits has been paid with respect to any individual, proper adjustment or recovery shall, subject to the succeeding provisions of this subsection, be made by appropriate adjustments in future payments to such individual or by recovery from such individual or his eligible spouse (or from the estate of either) or by payment to such individual or his eligible spouse . . . .

. . . . .

"(B) The Secretary (i) shall make such provision as he finds appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be against equity and good conscience, or (because of the small amount involved) impede efficient or effective administration of this subchapter . . . ." Act §§1631(b)(1)(A), (B); 42 U. S. C. §§1383(b)(1)(A), (B) (1982 ed., Supp. V).

In the provisions set forth above, the Act contemplates that the Secretary will "fin[d] [whether] more or less than the correct amount" of payment has been made. Elsewhere, it confers upon the Secretary general authority to "make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions," Act §205(a), 42 U. S. C. §405(a) (1982 ed.); see also Act §1631(d)(1), 42 U. S. C. §1383(d)(1) (1982 ed., Supp. V) (SSI). Pursuant to that authority, the Secretary promulgated the regulations at issue here. The SSI regulation provides:

> "The amount of an underpayment or overpayment is the difference between the amount paid to a recipient and the amount of payment actually due such recipient for a given period. An overpayment or underpayment period begins with the first month for which there is a difference between the amount paid and the amount actually due for that month. The period ends with the month the initial determination of overpayment or underpayment is made." 20 CFR §416.538 (1989).

The OASDI regulation unhelpfully provides that "[t]he amount of an overpayment or underpayment is the difference between the amount paid to the beneficiary and the amount of the payment to which the beneficiary was actually entitled," 20 CFR §404.504 (1989), but the Secretary has interpreted this as embodying the methodology set forth in the SSI regulation. Dept. of Health and Human Services, Social Security Ruling 81–19a (cum. ed. 1981).

Two hypotheticals will illustrate the operation of the netting regulations. Mr. A, entitled to $100 per month, is erroneously paid $80 in January and erroneously paid $150 in February. In March, the Secretary determines that these payments were incorrect, nets the errors (*i. e.*, calculates the difference between the underpayment and the overpayment), and seeks to recover the net overpayment of $30. Mrs. B, also entitled to $100 per month, receives $50 in April and $110 in May. In June, the Secretary makes the incorrect payment determination, nets the errors, and pays out $40. In neither case may the beneficiary seek to have the underpayment and the overpayment treated separately: Mr. A could not demand $20 for January and seek a waiver of the recoupment of $50 for February, and Mrs. B could not demand $50 for April and seek a waiver for the $10 in May.

In the present case, the Secretary made both underpayments and overpayments to each of the respondents, and netted those errors pursuant to the regulations. He determined that three respondents (the original plaintiffs) received net underpayments, and paid that net amount. The other respondents (intervenors below) received net overpayments, and the Secretary offered them hearings to determine whether recoupment should be waived as to the net overpayment. The plaintiffs (later joined by the intervenors) filed this suit under §§ 205(g) and 1631(c)(3) of the Act, 42 U. S. C. §§ 405(g), 1383(c)(3) (1982 ed.), in the United States District Court for the District of Colorado. They claimed that the netting regulations were facially invalid because (1) they were contrary to the Act and (2) they violated beneficiaries' rights to procedural due process. The District Court granted respondents' motion for summary judgment on the former ground, and the Court of Appeals for the Tenth Circuit affirmed in all relevant respects. *Everhart* v. *Bowen*, 853 F. 2d 1532 (1988). The court noted that two other Courts of Appeals had upheld the netting regulations against similar attacks. *Id.*, at 1536–1537 (citing *Lugo* v. *Schweicker*, 776 F. 2d 1143 (CA3 1985), and *Webb* v. *Bowen*, 851 F. 2d 190 (CA8 1988)).

We granted certiorari. 490 U. S. 1080 (1989).

II

Our mode of reviewing challenges to an agency's interpretation of its governing statute is well established: We first ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984). "In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole." *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988); see also *Mead Corp.* v. *Tilley*, 490 U. S. 714, 722–723 (1989). But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute," *Chevron*, *supra*, at 843, that is, whether the agency's construction is "rational and consistent with the statute," *NLRB* v. *Food and Commercial Workers*, 484 U. S. 112, 123 (1987). These principles apply fully to the Secretary's administration of the Act. See *Schweiker* v. *Gray Panthers*, 453 U. S. 34, 43 (1981); *Batterton* v. *Francis*, 432 U. S. 416, 425 (1977).

A

We first consider whether the Act speaks directly to the validity of the netting regulations. Two provisions are relevant: a general authorization and a specific limitation. First, the Act authorizes the Secretary to determine whether "more or less than the correct amount" has been paid. 42 U. S. C. §§404(a)(1), 1383(b)(1)(A) (1982 ed., Supp. V). The Act does not define the term "correct amount." It assuredly *could* be construed to refer to the amount properly owing *for a given month*. If that were the only possible interpretation, respondents would prevail, since the netting regulations ascertain the correct amount for a longer time period. But the Act does not foreclose a more expansive interpretation of "correct amount," viz., the amount properly owing *as of the date of the determination*. Although the Act elsewhere describes OASDI and SSI as monthly benefit programs, *e. g.*, Act § 202(a), 42 U. S. C. § 402(a) (1982 ed., Supp. V); Act § 1611(c)(1), 42 U. S. C. § 1382(c)(1) (1982 ed., Supp. V), it nowhere specifies that the correctness of payments must be determined on a month-by-month basis.

The fuller context of the OASDI provisions suggests that Congress, in authorizing the Secretary to determine whether the "correct amount" was paid, did not prohibit him from making that determination for more than a monthly time period. The Act authorizes a determination of whether "the correct amount of *payment* has been made," 42 U. S. C. § 404(a)(1) (1982 ed., Supp. V), and mandates adjustments "[w]ith respect to *payment* to a person of more than the correct amount," § 404(a)(1)(A), and "[w]ith respect to *payment* to a person of less than the correct amount," § 404(a)(1)(B). If Congress had in mind only shortfalls or excesses in individual monthly payments, rather than in the overall payment balance, it would have been more natural to refer to "the correct amount of *any payment*," and to require adjustment "with respect to *any payment* . . . of less [or more] than the correct amount." This terminology is used elsewhere in § 204(a)(1)(A), whenever individual monthly payments are at issue ("the Secretary shall decrease *any payment* under this subchapter to which such overpaid person is entitled"; "shall decrease *any payment* under this subchapter payable to his estate"). 42 U. S. C. § 404(a)(1)(A) (1982 ed., Supp. V) (emphases added). Moreover, the provision governing adjustment of overpayments to a deceased beneficiary seems to contemplate computation on a multipayment basis ("[T]he Secretary . . . shall decrease any payment under this subchapter payable to his estate or to any other person on the basis of the wages and self-employment income which were the basis *of the payments to such overpaid person*"). *Ibid.* (emphasis added).

The Act's provisions governing SSI are slightly different, but in no way contradict the Secretary's position. They authorize the Secretary to determine whether "more or less than the correct amount of *benefits* has been paid," 42 U. S. C. § 1383(b)(1)(A) (1982 ed., Supp. V) (emphasis added). Had this read "more or less than the correct amount of *any benefit*" it might support respondents' position, but as written it at least bears (if it does not indeed favor) the interpretation that more than a single monthly benefit is at issue.

Respondents nevertheless maintain, as did the Court of Appeals, that another provision of the Act directly precludes the Secretary from netting underpayments and overpayments. They point to § 204(b), 42 U. S. C. § 404(b) (1982 ed.), which provides: "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." See also Act § 1631(b)(1)(B), 42 U. S. C. § 1383(b)(1)(B) (1982 ed., Supp. V) (SSI). Respondents argue that by using the phrase "adjustment or recovery," Congress intended to subject to this requirement all collection methods, including the setoff effected by netting. They claim this broad meaning is given to the words "adjustment" and "recovery" by other Social Security regulations (*e. g.*, 20 CFR §§ 404.502–404.503 (1989)), common usage (*e. g.*, Webster's Third New International Dictionary 27, 1898 (1981) (hereinafter Webster's)), and general legal usage (*e. g.*, *United States* v. *Burchard*, 125 U. S. 176 (1888)). Under this interpretation, when the agency calculates the difference between, or nets, Mr. A's $20 underpayment and his $50 overpayment, see *supra*, at 87–88, it has engaged in "adjustment or recovery," but without complying with the restrictions on "adjustment or recovery" that the Act imposes.

In our view, however, with this provision as with those discussed earlier, respondents have established at most that the language may bear the interpretation they desire—not that it cannot bear the interpretation adopted by the Secretary. "Adjustment" *can* have the more limited meaning (which the Secretary favors) of "an increase or decrease" of payments (Webster's 27), and "recovery" *can* have the more limited meaning of "get[ting] back" payments already made (see *id.*, at 1898 ("recover")). Moreover, other provisions of the Act support this limited meaning. It is at least reasonable, if not necessary, to read the phrase "adjustment or recovery" in § 204(b) *in pari materia* with the identical phrase in § 204(a)(1). The latter section directs the Secretary, if he finds that incorrect payment has been made, to make "proper adjustment or recovery . . . *as follows.*" In the case of overpayment, he shall "decrease any payment under this subchapter to which such overpaid person is entitled, or shall require such overpaid person or his estate to refund the amount in excess of the correct amount . . . ." 42 U. S. C. § 404(a)(1)(A) (1982 ed., Supp. V). As to SSI, "adjustment or recovery shall . . . be made by appropriate adjustments in future payments to such individual or by recovery from . . . or by payment to such individual or his eligible spouse . . . ." 42 U. S. C. § 1383(b)(1)(A) (1982 ed., Supp. V). Giving the terms their more limited meaning does not produce absurd policy consequences. Reducing future benefits, or requiring the beneficiary to pay over cash, will ordinarily produce more hardship than merely setting off past underpayments and overpayments. It is not at all unreasonable to think that waiver hearings were established only for the former.

As used in the Act, therefore, adjustment can be read to mean decreasing future payments, and recovery to mean obtaining a refund from the beneficiary. Under this interpretation, when the agency nets Mr. A's underpayment against his overpayment, it is not engaged in "adjustment or recovery," but only in the calculation of whether "more or less than the correct amount of payment has been made." Only *after* making that calculation does the Secretary take the additional step of rectifying any error by "adjustment" (increasing or decreasing future payments) or "recovery" (obtaining a refund from the beneficiary). And it is only this latter step that is governed by § 204(b) of the Act. We do not say this is an inevitable interpretation of the statute; but it is assuredly a permissible one.

B

Since the Act reasonably bears the Secretary's interpretation that netting is permitted, only one issue remains: Respondents contend that the manner in which the regulations provide for netting to be conducted is arbitrary and capricious, because of their definition of the netting period. Overpayments are netted with underpayments up to the "month [of] the initial determination" of error. 20 CFR § 416.538 (1989). "Initial determination" is a term of art meaning the Secretary's formal determination that an error was committed. See 20 CFR §§ 404.902, 416.1402 (1989). Needless to say, that formal determination will not be simultaneous with the Secretary's first discovery that something is amiss; delay is inevitable. Respondents contend that this delay is fatal. At best, they say, the period over which netting is conducted will turn on the fortuity of the time period between discovery and formal determination. At worst, the Secretary will manipulate the netting period by delaying formal determination, thus including more underpayments in the netting period and reducing the net overpayment subject to the recoupment-waiver procedures.

It seems to us not arbitrary or capricious to establish a grace period within which these determinations can be considered and formally made; they should not be spur-of-the-moment decisions. That delay will extend the netting period, and may result in the inclusion of more underpayments to be netted. But we cannot say that the alternatives—immediate determinations, or determinations within a fixed period—would not produce errors that make beneficiaries worse off on the whole.

Moreover, although the Secretary's regulations do not establish a fixed time period for the formal determination, they do establish a time limit upon the principal adverse consequence of delay: the netting-in of additional underpayments. The regulations provide:

> "Where an apparent overpayment has been detected but determination of the overpayment has not been made (see § 416.558(a)), a determination and payment of an underpayment which is otherwise due cannot be delayed unless a determination with respect to the apparent overpayment can be made before the close of the month following the month in which the underpaid amount was discovered." 20 CFR § 416.538 (1989).

See also Dept. of Health and Human Services, Program Operations Manual System, GN 02201.002 (1989) (Social Security Administration policy to resolve overpayments as quickly as possible). Respondents' fear of intentional manipulation of the netting period can be entirely dismissed if this provision is observed in good faith—as we must presume, in this facial challenge, it will be. See, *e. g.*, *FCC* v. *Schreiber*, 381 U. S. 279, 296 (1965). The intentional manipulation hypothesis is in any event implausible. Deliberately protracting the netting period may indeed draw in future underpayments; but it may just as likely draw in future overpayments, which will be uncollectible until the Secretary's determination is made. The Secretary might conceivably ensure that delay works to the Government's financial advantage by *deliberately* underpaying while keeping the netting period open, but since that is an obvious violation of the Act it is again not the stuff of which a facial challenge can be constructed.

In addition to the fact that the disadvantages of the Secretary's approach are less than respondents assert, the disadvantages of respondents' approach are more. The Secretary points out that a separate accounting for each month would cause the agency great expense, in the cost of a greatly increased volume of complex recoupment-waiver proceedings, in the cost of overpayments that are simply written off because the cost of the proceedings would exceed the recovery, and in the cost of overpayments whose return will be subject to lengthy delays. These expenses "in the end come out of the pockets of the deserving since resources available for any particular program of social welfare are not unlimited." *Mathews* v. *Eldridge*, 424 U. S. 319, 348 (1976).

Respondents seek to minimize the administrative burden by proposing a scheme under which the Secretary would notify the beneficiary of underpayments and overpayments, withhold reimbursement of the underpayments for a brief period during which the beneficiary may seek waiver of recoupment of overpayments, and then net the underpayments and that portion of the overpayments as to which waiver has not been sought. This scheme, however, does not at all address the problem of delay in netting that is the asserted basis for finding the regulations arbitrary and capricious. Substituting "notification" of underpayments and overpayments for "determination" of underpayments and overpayments merely gives the occasion for the delay another name. What this alternative proposal of respondents really puts forward is an alternative means of assuring that overpayments cannot be "netted out" without an opportunity for waiver hearing. As we discussed at length earlier, the statute does not require such assurance. In sum, we find no basis for holding the regulations arbitrary and capricious.

* * *

The Court of Appeals did not reach respondents' contention that the regulations violate due process, and we will not address that claim in the first instance. See, *e. g., United States* v. *Sperry Corp.*, 493 U. S. 52, 66 (1989). Accordingly, the judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE KENNEDY join, dissenting.

The kingly power to rewrite history has not been delegated to the Secretary of Health and Human Services. Nevertheless, the Secretary now claims authority to determine that no underpayment has been made to a beneficiary who concededly received a deficient monthly payment. The majority accepts this argument. Because I believe this result inconsistent with both common sense and the plain terms of the statute, I respectfully dissent.

The Social Security Act (Act), 42 U. S. C. § 401 *et seq.* (1982 ed. and Supp. V), establishes the Old-Age, Survivors, and Disability Insurance program (OASDI) and the Supplemental Security Income program (SSI). By enacting this legislation, Congress authorized the Secretary to make monthly payments to literally millions of elderly and needy beneficiaries. Anticipating that there will inevitably be many occasions on which such a payment is more or less than the correct amount, Congress directed the Secretary to prescribe regulations outlining the procedure for remedying overpayments and underpayments.

In the vast majority of cases, these procedures are uncontroverted. We deal today only with a narrow category of disputed cases in which claimants assert rights designed to protect specially disadvantaged beneficiaries. Respondents, like the plaintiffs in *Califano* v. *Yamasaki*, 442 U. S. 682 (1979), wish to compel the Secretary to waive his claim for recoupment of an overpayment. See 42 U. S. C. § 404(b) (1982 ed.) (§ 204(b) of the Act) and 42 U. S. C. § 1383(b)(1)(B)(i) (1982 ed., Supp. V) (§ 1631(b)(1)(B)(i) of the Act) (requiring waiver by the Secretary under certain circumstances). The Secretary protests that allowing these waivers would burden the benefits program with "great expense" and a "greatly increased volume of complex . . . proceedings." *Ante*, at 94. The Secretary's fears are, of course, irrelevant if the statute commands him to honor respondents' waiver requests. Moreover, we noted in *Yamasaki* that in 1977 the average overpayment to OASDI beneficiaries exceeded $500, but that only 3.4 percent of the overpaid persons requested that the Secretary waive recoupment. 442 U. S., at 686, n. 2. Thus, although § 204(b) applies as a legal matter to all OASDI cases in which "more than the correct amount of payment has been made," our decision today applies as a practical matter only to about 3.5 percent of OASDI overpayments. Even this category encompasses overpayments not implicated by respondents' complaint, however. The present controversy affects only those cases in which the Secretary attempts to recoup an overpayment by netting it together with an underpayment, *and* in which the beneficiary seeks a waiver. We address, in short, the claims of a subset of the minority of overpaid beneficiaries who seek waivers.[1]

With respect to these beneficiaries, as in all other cases involving overpayments, Congress has given the Secretary explicit mandatory instructions. Those instructions require him to recognize that any case in which "more than the correct amount of payment has been made" involves a factual event that cannot be ignored. The Secretary cannot erase the historical record or pretend that the overpayment never occurred simply because later events alter the significance of earlier ones.

This is what the statutory command says about OASDI overpayments:[2]

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[1] The Secretary's argument becomes especially weak if this subset is very large. If the Secretary can evade the waiver provisions by netting overpayments against underpayments, and if netting is possible in most cases, then the Secretary's procedures would effectively nullify the waiver provisions. Such a consequence would be strong evidence that the Secretary's procedures are inconsistent with the statute. See, *e. g.*, *Colautti* v. *Franklin*, 439 U. S. 379, 392 (1979) (it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative").

[2] SSI overpayments subject the Secretary to a similar command. Section 1631(b)(1)(B)(i) of the Act, 42 U. S. C. § 1383(b)(1)(B)(i) (1982 ed., Supp. V), reads: "The Secretary . . . shall make such provision as he finds

> "In any case in which more than the correct amount of payment has been made, there shall be no adjustment of payments to, or recovery by the United States from, any person who is without fault if such adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience." § 204(b) of the Act; 42 U. S. C. § 404(b) (1982 ed.).

We have previously recognized that this provision "concerning the fact of the overpayment" speaks in "the imperative voice" and requires that "'there shall be no adjustment of payments to, or recovery by the United States from, any person' who qualifies for waiver." *Califano* v. *Yamasaki*, 442 U. S., at 693–694.

As the Court of Appeals for the Tenth Circuit observed, by this provision and its SSI counterpart the "statute makes a clear differentiation" between overpayments and underpayments. *Everhart* v. *Bowen*, 853 F. 2d 1532, 1537 (1988). "While the provisions relating to underpayments mandate payment without qualification, the recovery of overpayment provisions are qualified by the waiver of recoupment procedures." *Ibid.* The reason for this distinction is easily surmised. A needy person who unknowingly receives an overpayment may spend it, not realizing that the Government will later take back money by reducing needed benefits, or by refusing to compensate for a prior underpayment. The beneficiary may be left without money essential to pay monthly bills. Thus, as Judge Gibbons has observed, the "difference in treatment of overpayments and underpayments . . . is quite consistent with the fundamental policy

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appropriate in the case of payment of more than the correct amount of benefits with respect to an individual with a view to avoiding penalizing such individual or his eligible spouse who was without fault in connection with the overpayment, if adjustment or recovery on account of such overpayment in such case would defeat the purposes of this subchapter, or be against equity and good conscience, or (because of the small amount involved) impede efficient administration of this subchapter."

motivating Congress in enacting both Titles; namely assuring those most in need in our society that they will receive a monthly benefit which will from month to month provide for the necessities of life." *Lugo* v. *Schweiker*, 776 F. 2d 1143, 1154 (CA3 1985) (dissenting opinion). The procedures at issue here, however, "treat overpayments and underpayments equally," *Everhart*, 853 F. 2d, at 1537, thereby deviating from both the letter and the purpose of the statutory command.

If we use two typical cases involving a $500 overpayment as examples, we can readily see how the Secretary's "netting regulations" violate the statutory command. In the first example, we may assume that the $500 overpayment was made in 1978 and first discovered in 1988. If we further assume that the beneficiary was without fault and that it would have been against equity and good conscience to recoup that amount from him in 1988, it necessarily follows that he had a statutory right to a waiver of any such recoupment. In our second hypothetical example, we may assume the same facts with the addition that in 1988 the beneficiary's monthly checks were erroneously reduced by $250 for each of two months. Under the Secretary's reading of the statute, the beneficiary's request for payment of the balance of the amount due for those two months could be denied on the ground that neither more nor less than the correct amount of payment had been made during the period between 1978 and 1988.

In my view such a reading of the statute is intolerable. The assumption that an underpayment in 1988—whether negligent or deliberate—could extinguish a needy beneficiary's statutory right to request a waiver of recoupment of an overpayment that occurred years earlier is flatly inconsistent with the statutory command that "equity and good conscience" should determine the waiver issue. For the Secretary to pretend that neither more nor less than the correct amount had been paid—when there was not only a series of incorrect monthly payments in 1978 but also a pair of incorrect payments in 1988—is nothing short of rewriting history to destroy a citizen's valuable statutory right.

In light of the statistics quoted in *Yamasaki*, 442 U. S., at 686, n. 2, we might expect that the Secretary's refusal to recognize waiver requests would injure beneficiaries in less than 4 percent of the netting cases. The illustrative hypotheticals propounded by the majority, which suppose an underpayment and overpayment in quick succession during a 2-month period, *ante*, at 87–88, are most likely typical of the cases in which a beneficiary would elect not to request any waiver. Yet, as Congress foresaw, recoupment of other overpayments may entail much more serious difficulties for the statutory beneficiaries. The Secretary's "netting regulations" cover brief 2-month discrepancies, like the examples invented by the majority, but the regulations also authorize netting over multiyear periods, as was done with respect to the actual respondents in this case. The regulations may thus provide a form of rough justice in 97 percent of the netting cases, but that ratio in no way excuses the injustice that is apparent in true hardship cases. Those cases are few in comparison to the total volume handled by the Secretary. They are, however, of crucial importance to the beneficiaries.

For some beneficiaries the amount at stake is substantial, and the reasons why Congress commanded the Secretary to carefully consider the equities of the particular case are overwhelmingly apparent. Thus, for example, respondent Emil Zwiezen and his wife are both dependent on their monthly Social Security checks of $911. According to the Secretary, Mr. Zwiezen received $9,483 in overpayments between 1978 and 1981. The Secretary, however, failed to give Mr. Zwiezen certain increases in his monthly benefit amount to which he was entitled and, by April 1984, he had accumulated underpayments of $4,376. Although he ultimately received a waiver of the net overpayment remaining after the Secretary subtracted the underpayments, Mr. Zwiezen never had an opportunity to obtain a waiver of the entire overpayment and thus could not recover any portion of the increases that had been denied to him. According to his affidavit, the resulting shortfall caused this elderly couple to suffer severe emotional and financial consequences. Mr. Zwiezen could not pay his water bills, had fallen behind in his house payments, and feared that his doctor and druggist would stop providing him medical care. Affidavit of Emil Zwiezen, reproduced in Brief for Appellee in No. 87–1839 (CA10), p. 31A. See also *Everhart* v. *Bowen*, 694 F. Supp. 1518, 1519–1520 (Colo. 1988).

The validity of the netting regulations that enabled the Secretary to recover $4,376 from Mr. Zwiezen without giving him the notice and opportunity to request a waiver required by § 204(b) depends on a highly unnatural reading of three statutory provisions. First, the Secretary assumes that no overpayment or underpayment can actually occur until he finds that it has occurred. This assumption is not only foreclosed by the plain language of § 204(b) and § 1631 (b)(1)(B)(i),[3] but also perversely converts a duty to find the facts into a power to change them.

Second, the Secretary assumes that the words "adjustment" and "recovery" in the two prohibitions against inequitable recoupment of overpayments do not apply to either a deliberate or an inadvertent decrease in monthly payments unless the Secretary has previously made a formal finding that an overpayment occurred. As a practical matter this means that either a simple mistake or a deliberate effort to await underpayments before recognizing overpayments can effect the same adjustment or recovery that the statute expressly prohibits.[4] But "[n]o recovery means no recovery by setoff, and no recovery by suit; no recovery at all." *Lugo* v. *Schweiker*, 776 F. 2d, at 1154 (Gibbons, J., dissenting). The "netting regulations permit the Secretary to accomplish what the waiver provisions plainly and unequivocally forbid; namely a recovery by the United States of overpayments without a hearing on waiver." *Id.*, at 1155 (footnote omitted). In my opinion the words "adjustment" and "recovery" are not such chameleons.

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[3] The OASDI provision reads: "In any case in which more than the correct amount of payment has been made, there shall be no adjustment . . . ." 42 U. S. C. § 404(b) (1982 ed.). Notably, the section does not refer to "any case in which the *Secretary finds that* more than the correct amount of payment has been made . . . ."

Likewise, 42 U. S. C. § 1383(b)(1)(B)(i) (1982 ed., Supp. V) applies "in the case of payment of more than the correct amount of benefits . . . ," not merely "in the case *that the Secretary finds* payment of more than the correct amount of benefits."

Finally, in a statutory scheme that is replete with references to monthly payments and monthly benefits,[5] the Secretary assumes that the word "payment" as used in § 204(a), § 204(b), and § 1631(b)(1)(B)(i), and the word "benefits" as used in § 1631(b)(1)(A), refer to the aggregate amount of numerous payments that may have been made over a period of several years. Indeed, the relevant payment period—instead of the month in which more or less than the correct amount of payment has been made—is in the Secretary's eyes an accordion-like concept that may be expanded to encompass overpayments that occurred in the past or underpayments that are ongoing. "The key to the netting regulations is the Secretary's completely artificial definition of the period for calculation of overpayments and underpayments." *Lugo*, 776 F. 2d, at 1155 (dissenting opinion).

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[4] The majority speculates that "[d]eliberately protracting the netting period may indeed draw in future underpayments; but it may just as likely draw in future overpayments, which will be uncollectible until the Secretary's determination is made." *Ante*, at 94. This proposition depends, of course, upon the relative frequency of overpayments and underpayments. The majority assumes that the two occur with equal frequency, an assumption for which it offers no support. One might indeed make precisely the opposite assumption: that the Government errs in its own favor more often, and more substantially, than it errs in favor of beneficiaries.

[5] See, *e. g.*, 42 U. S. C. §§ 402(a), 402(j) (1982 and Supp. V); 42 U. S. C. § 1382(c)(1) (1982 ed., Supp. V).

The net effect of these distortions of statutory language is to defeat clear congressional intent. The Secretary contends that we must nevertheless defer to his interpretation of the statute. Relying heavily upon *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984), the Secretary would have us believe that his responsibility to construe ambiguous provisions in the statutes he administers confers upon him authority to define away overpayments and underpayments when a program participant has received both. The majority accepts this suggestion. But *Chevron* and its progeny yield the Secretary no such privilege. Because the "judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent," we defer to the administrator's interpretation of a statute only after "employing traditional tools of statutory construction." *Id.*, at 843, n. 9. We have accordingly not hesitated to find that "agency interpretations must fall to the extent they conflict with statutory language." *Public Employees Retirement System of Ohio* v. *Betts*, 492 U. S. 158, 171 (1989). See also *Dole* v. *Steelworkers*, *ante*, p. 26; *INS* v. *Cardoza-Fonseca*, 480 U. S. 421, 445–450 (1987).

Indeed, *Califano* v. *Yamasaki*, 442 U. S. 682 (1979), in which we first recognized the hearing right the Secretary has denied to these respondents, itself rejected the Secretary's reading of this statute. Although the statute does not state by express terms that a hearing is essential before the Secretary makes a § 204(b) waiver decision, we nevertheless found it clear in *Yamasaki* that Congress intended that a hearing be held. We analyzed the statute and concluded that "the nature of the statutory standards makes a hearing essential." *Id.*, at 693. The import of the statutory terms in this case is, I believe, equally clear.[6]

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[6] It is, of course, of no importance that *Yamasaki* predates *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837

The majority, however, refuses to heed the direction of those standards. In so doing, the majority makes much of its conclusion that, had Congress wished to prohibit netting, "it would have been more natural" for Congress to phrase its command in terms of "any payment." *Ante*, at 90. Perhaps that is so.[7] But it is entirely possible that Congress clearly

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(1984). As we made clear in *Chevron*, the interpretive maxims summarized therein were "well-settled principles." *Id.*, at 845.

[7] Even this much is far from clear. The majority's suggestion is that Congress could have referred to individual monthly payments, rather than a net transfer, by using the phrase "any payment," rather than simply "payment," in, for example, 42 U. S. C. § 404(b) (1982 ed.). The provision reads in relevant part, "In any case in which more than the correct amount of payment has been made . . . ."

For reasons already stated, I do not believe that this provision is ambiguous. But if it were, the majority's suggestion would not dispell entirely the interpretive difficulties that trouble the majority. The word "payment" embraces two concepts: that of a wealth transfer, and that of a transaction used to effect such a transfer. For this reason, it is possible for a lender to tell a borrower that "a series of 15 *payments* will be needed to effect *payment* of the debt." By using the plural form of "payment," the lender focuses attention upon several transactions, rather than the transfer accomplished by the transactions together. And, indeed, careful examination of the statute, the majority opinion, and this dissent will show that all three frequently distinguish transactions from transfer by invoking the plural, "payments."

The majority wisely declines to suggest that Congress should have used the plural in § 404(b) to prohibit netting. That option was not available for two reasons. First, we are imagining how Congress might redraft the section to refer more specifically to a single defective *payment*, and *not* to multiple *payments*. Had Congress referred to the "correct amount of *payments*," readers would have believed that Congress was referring, albeit awkwardly, to the *number* of transactions, rather than to the amount of an individual transaction. Second, although we are assuming that Congress does not wish to refer to the *comprehensive* transfer effected by multiple payments together, Congress must refer to the *subsidiary* transfer accomplished by the transaction in question: it is precisely the abnormality of that transfer which makes the transaction of interest. We are dealing, in short, with a payment of improper payment.

As already noted, the majority proposes to solve this problem by inserting the word "any" before "payment." But the adjective begs the quesintended to prohibit any netting that diminishes waiver rights, but nonetheless did not have the netting problem in mind when drafting language relevant to overpayments and

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tion. "Any payment" may differ from "payment" not by distinguishing a single transaction or transfer from the aggregate of all such transfers, but rather by distinguishing all possible such aggregate transfers from some paradigmatic group of aggregate transfers. The word "any" arguably makes the subsection applicable to *any and all* possible payments. In other words, the introductory clause to the redrafted version of § 404(b) would include the word "any" twice—"In *any* case in which more than the correct amount of *any* payment has been made . . ."—but the majority and the Secretary could continue to make in the face of two "anys" the argument they now make in the face of one. The second "any" would rule out exceptions to the general rule without explaining whether the general rule applied to transfers or transactions: the revised statute might be read to mean that the Secretary must provide for waiver by any and all beneficiaries of any and all net overpayments. This may not be the most obvious interpretation, but, to use the majority's own phrase, the proposed language "reasonably bears" this interpretation. *Ante,* at 93. Accordingly, the majority would apparently have to permit netting by the Secretary even if confronted by its own proposed clear expression of congressional intent to prohibit netting.

The Congress which the majority imagines would thus have to search for other means to express its intent. One possible attempt is actually in the statute. Congress uses the awkward phrase, "correct amount of payment has been made." The educated layman may cringe on hearing this legalism; "correct amount has been paid" seems to say as much and more crisply. Why add the bulky "of payment"? It is at least possible that Congress hoped to focus attention on individual payments: the "of payment" reminds the reader that "amounts" due are not simply due in total, but due in regular installments—denominated "payments." This point is obviously not dispositive, but it is more plausible than the majority's discussion of "any payment."

Of course, Congress could have obviated the need for any such analysis by inserting into the statute a reference to payments in individual months, or simply by saying: "The Secretary shall not net underpayments and overpayments." My point is not that a more precise statute is impossible, however; my point is only that the interpretive difficulties posed by the statute cannot reasonably be ascribed to a conscious delegation, to the absence of intent, or to inability to forge a coalition. See *Chevron,* 467 U. S., at 865. Rather, the interpretive problems pending before us result underpayments. The netting procedure here is so inconsistent with the mandatory character of the waiver provision,[8] with the statutory terms discussed above, and with the statute's reference to "equity and good conscience," that Congress might simply have thought it unnecessary to add further language ruling out specifically any such program. In any event, the majority's argument is irrelevant.[9] Just as we do not sit to supply statutory directives where Congress gave none, we likewise do not sit to insist that Congress express its intent as precisely as would be possible. Our duty is to ask what Congress intended, and not to assay whether Congress might have stated that intent more naturally, more artfully, or more pithily.

In this case it is clear beyond peradventure that Congress intended to ensure that needy citizens would receive their full monthly benefit checks, even if that policy sometimes means forgoing any opportunity the Government might have to recoup an earlier overpayment. The Secretary's reading of the statute puts an unreasonable strain upon both its words and its purpose. If context were ignored entirely, I suppose that a student of language could justify the Secretary's interpretation of "adjustment" and "payment," and his duty to find historical facts. Perhaps that is what the majority means when it says that the statutory language "reason-

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from an imprecision inherent in the concept of payment. That sort of imprecision is inevitable in political language. See The Federalist No. 37, p. 230 (E. Earle ed. 1937) (James Madison on the nature of imprecision in political concepts).

[8] See *Yamasaki*, 442 U. S., at 693–695.

[9] In *Yamasaki*, for example, we interpreted the statute to confer a hearing right, even though Congress never used the word "hearing." One might argue that if Congress wished to establish a hearing right, "it would be more natural" for Congress to draft a statute that mentioned hearings expressly. The *Yamasaki* Court supplied the proper answer to this objection: whether or not reference to hearings would be more natural, it is unnecessary, since the hearing right inheres in "the nature of the statutory standards." *Id.*, at 693.

ably bears," *ante*, at 93, the Secretary's argument. But I find it inconceivable that wise judges can conclude that regulations in which the Secretary delegates to himself the power to rewrite history are "based on a permissible construction of the statute." *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S., at 843.

I respectfully dissent.

SELVAGE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 87–6700. Argued January 17, 1990—Decided February 21, 1990

Petitioner Selvage filed a petition for a writ of certiorari to review a Court of Appeals' decision refusing to grant a stay of execution. This Court stayed the execution and withheld disposition of the petition pending the decision in *Penry* v. *Lynaugh*, 492 U. S. 302. Following that decision, certiorari was granted to answer the question whether, at the time of trial, there was cause for not raising a claim based upon arguments later accepted in *Penry* v. *Lynaugh*, and, if not, whether the application of a procedural bar to the claim would result in a fundamental miscarriage of justice.

Held: The case is remanded for a determination whether Selvage's *Penry* claim is presently procedurally barred under Texas law. The Director of the Texas Department of Criminal Justice disputes Selvage's argument that his *Penry* claim would no longer be deemed procedurally barred by the Texas Court of Criminal Appeals. However, since *Penry* was handed down after his petition for certiorari was filed and may have affected the state court's view on whether the claim is presently barred, this issue should be decided by the Court of Appeals before the question on which certiorari was granted is addressed.

842 F. 2d 89, vacated and remanded.

Richard H. Burr III argued the cause for petitioner. With him on the briefs were *Julius L. Chambers*, *George H. Kendall*, and *David Cunningham*.

Robert S. Walt, Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Jim Mattox*, Attorney General, *Mary F. Keller*, First Assistant Attorney General, *Lou McCreary*, Executive Assistant Attorney General, and *Michael P. Hodge*, *Dana E. Parker*, *Andrea L. March*, and *Don Morehart*, Assistant Attorneys General.*

PER CURIAM.

In March 1988, petitioner sought certiorari to review a decision of the United States Court of Appeals for the Fifth Circuit refusing to stay the execution of his death sentence. We granted a stay of execution, 485 U. S. 983 (1988), and withheld disposition of the petition pending our decision in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Following that decision we granted certiorari in petitioner's case to answer this question:

> "At the time petitioner was tried, was there 'cause' for not raising a claim based upon arguments later accepted in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), and if not, would the application of a procedural bar to the claim result in a 'fundamental miscarriage of justice,' *Smith* v. *Murray*, 477 U. S. 527, 537–538 (1986)?" 493 U. S. 888 (1989).

Petitioner contended in his brief and in his oral argument that his claim for relief based on *Penry* would no longer be deemed procedurally barred by the Texas Court of Criminal Appeals. The Director of the Texas Department of Criminal Justice, respondent here, disputes that contention.

Because our decision in *Penry* was handed down after petitioner's petition for certiorari was filed, and may have affected the view of the Texas Court of Criminal Appeals on the issue whether petitioner's claim is presently barred, we think that issue should be decided before we address the

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**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging affirmance.

Briefs of *amici curiae* were filed for the Harris County Criminal Lawyers Association by *Stanley G. Schneider;* and for Harvey Earvin by *Robert L. McGlasson.*

question on which we granted certiorari. The Court of Appeals for the Fifth Circuit is more familiar with Texas law than we are, and we therefore vacate the judgment of the Court of Appeals and remand the case to it for determination whether petitioner's *Penry* claim is presently procedurally barred under Texas law.

It is so ordered.

JUSTICE BRENNAN, concurring.

I concur in the Court's disposition of the case. Even if I did not, I would vacate petitioner's death sentence. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment. See *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting).

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN joins, concurring.

I concur in the Court's disposition of this case. Petitioner contends that, under the rule announced in *Ex parte Chambers*, 688 S. W. 2d 483 (Tex. Crim. App. 1984), the Texas courts no longer will regard his *Penry* claim as procedurally barred. It is appropriate that this issue should be resolved as an initial matter, since if petitioner is correct it will be unnecessary to decide the federal question on which we granted certiorari. I also note that the Court of Appeals is free, if it wishes, to certify an appropriate question to the Texas Court of Criminal Appeals.

TEXAS *v.* NEW MEXICO

ON BILL OF COMPLAINT

No. 65, Orig. Stipulated judgment entered February 26, 1990

Based upon the recommendation of the Special Master, the Joint Motion for Entry of Stipulated Judgment (Joint Motion) is granted, and the Court hereby enters judgment as follows:

STIPULATED JUDGMENT

1. On or before March 1, 1990, New Mexico shall pay Texas $14 million, to be disbursed by Texas in accordance with Exhibit B to the Joint Motion which is herein reproduced, by either delivering a check or draft in that amount made payable to the State of Texas or transferring that amount to the State of Texas by electronic wire transfer.

2. Texas releases New Mexico from all claims for equitable or legal relief, other than the relief embodied in the March 28, 1988, Amended Decree and actions thereunder, arising out of New Mexico's breaches of the Pecos River Compact for the years 1952 through 1986, plus all claims for attorney's fees and other costs incurred prior to August 10, 1989.

3. Nothing herein affects the Court's March 28, 1988, Amended Decree and actions thereunder.

EXHIBIT B

Texas shall deposit $13.8 million in the Texas Water Assistance Fund No. 480 of the Texas Water Development Board (Board), created pursuant to Chapter 15 of the Texas Water Code, to be used for agricultural and irrigation projects (including associated water quality improvement projects) and any necessary associated studies in the Texas counties of Loving, Ward, Reeves, and Pecos. In funding such projects and studies, the Board shall give preference to projects and studies affecting surface water irrigators in the Red

Bluff Water Power Control District in the four designated Texas counties, if appropriate. The remaining $200,000 may be treated by the Attorney General of the State of Texas as attorney's fees or investigative costs; provided, however, Texas and New Mexico agree that any use of the settlement funds in this manner does not constitute, and shall not be construed as, an admission, express or implicit, that New Mexico has any liability for Texas' attorney's fees and costs incurred in this litigation.

ZINERMON ET AL. *v.* BURCH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87-1965. Argued October 11, 1989—Decided February 27, 1990

Respondent Burch, while allegedly medicated and disoriented, signed forms requesting admission to, and treatment at, a Florida state mental hospital, in apparent compliance with state statutory requirements for "voluntary" admission to such facilities. After his release, he brought suit under 42 U. S. C. § 1983 in the District Court against, *inter alios*, petitioners—physicians, administrators, and staff members at the hospital—on the ground that they had deprived him of his liberty without due process of law. The complaint alleged that they violated state law by admitting him as a voluntary patient when they knew or should have known that he was incompetent to give informed consent to his admission, and that their failure to initiate Florida's involuntary placement procedure denied him constitutionally guaranteed procedural safeguards. The court granted petitioners' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), relying on *Parratt* v. *Taylor*, 451 U. S. 527, and *Hudson* v. *Palmer*, 468 U. S. 517, which held that a deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim unless the State fails to provide a post-deprivation remedy. The court pointed out that Burch did not contend that the State's statutory procedure for placement was inadequate to ensure due process, but only that petitioners had failed to follow the procedure. Since the State could not have anticipated or prevented the unauthorized deprivation of Burch's liberty, the court reasoned, there was no feasible predeprivation remedy, and the State's postdeprivation tort remedies provided Burch with all the process that was due him. The Court of Appeals reversed and remanded.

Held: Burch's complaint was sufficient to state a claim under § 1983 for violation of his procedural due process rights. While *Parratt* and *Hudson* apply to deprivations of liberty, they do not preclude Burch's claim, because predeprivation procedural safeguards might have been of value in preventing the alleged deprivation of Burch's liberty without either valid consent or an involuntary placement hearing. Such a deprivation is not unpredictable. It is foreseeable that persons requesting treatment might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value. And the deprivation will occur, if at all, at a predictable point in the admissions process—when a patient is given admission forms to sign. Nor was predeprivation process impossible here. Florida has a procedure for involuntary placement, but only the hospital staff is in a position to take notice of any misuse of the voluntary admission process and to ensure that the proper procedures are afforded both to those patients who are unwilling and to those who are unable to give consent. In addition, petitioners' conduct was not "unauthorized" within the meaning of *Parratt* and *Hudson*, since the State had delegated to them the power and authority to deprive mental patients of their liberty and the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. Pp. 124–139.

840 F. 2d 797, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BRENNAN, WHITE, MARSHALL, and STEVENS, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA and KENNEDY, JJ., joined, *post*, p. 139.

Louis F. Hubener, Assistant Attorney General of Florida, argued the cause for petitioners. With him on the briefs was *Robert A. Butterworth*, Attorney General.

Richard M. Powers argued the cause and filed a brief for respondent.*

JUSTICE BLACKMUN delivered the opinion of the Court.

I

Respondent Darrell Burch brought this suit under 42 U. S. C. § 1983 (1982 ed.)[1] against the 11 petitioners, who are physicians, administrators, and staff members at Florida State Hospital (FSH) in Chattahoochee, and others. Re-

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Leon Friedman* and *Steven R. Shapiro;* and for the American Orthopsychiatric Association et al. by *John Townsend Rich*, *James E. Kaplan*, *Ruth L. Henning*, and *Leonard S. Rubenstein.*

[1] Section 1983 reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . ."

spondent alleges that petitioners deprived him of his liberty, without due process of law, by admitting him to FSH as a "voluntary" mental patient when he was incompetent to give informed consent to his admission. Burch contends that in his case petitioners should have afforded him procedural safeguards required by the Constitution before involuntary commitment of a mentally ill person, and that petitioners' failure to do so violated his due process rights.

Petitioners argue that Burch's complaint failed to state a claim under § 1983 because, in their view, it alleged only a random, unauthorized violation of the Florida statutes governing admission of mental patients. Their argument rests on *Parratt* v. *Taylor,* 451 U. S. 527 (1981) (overruled in part not relevant here, by *Daniels* v. *Williams,* 474 U. S. 327, 330–331 (1986)), and *Hudson* v. *Palmer,* 468 U. S. 517 (1984), where this Court held that a deprivation of a constitutionally protected property interest caused by a state employee's random, unauthorized conduct does not give rise to a § 1983 procedural due process claim, unless the State fails to provide an adequate postdeprivation remedy. The Court in those two cases reasoned that in a situation where the State cannot predict and guard in advance against a deprivation, a postdeprivation tort remedy is all the process the State can be expected to provide, and is constitutionally sufficient.

In the District Court, petitioners did not file an answer to Burch's complaint. They moved, instead, for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The court granted that motion, pointing out that Burch did not contend that Florida's statutory procedure for mental health placement was inadequate to ensure due process, but only that petitioners failed to follow the state procedure. Since the State could not have anticipated or prevented this unauthorized deprivation of Burch's liberty, the District Court reasoned, there was no feasible predeprivation remedy, and, under *Parratt* and *Hudson,* the State's postdeprivation tort remedies provided Burch with all the process that was due him.

On appeal, an Eleventh Circuit panel affirmed the dismissal; it, too, relied on *Parratt* and *Hudson*. *Burch* v. *Apalachee Community Mental Health Services, Inc.*, 804 F. 2d 1549 (1986). The Court of Appeals, however, upon its own motion, ordered rehearing en banc. 812 F. 2d 1339 (1987). On that rehearing, the Eleventh Circuit reversed the District Court and remanded the case. 840 F. 2d 797 (1988). Since Burch did not challenge the constitutional adequacy of Florida's statutory procedure, the court assumed that that procedure constituted the process he was due. *Id.*, at 801, n. 8. A plurality concluded that *Parratt* did not apply because the State could have provided predeprivation remedies. 840 F. 2d, at 801–802. The State had given petitioners the authority to deprive Burch of his liberty, by letting them determine whether he had given informed consent to admission. Petitioners, in the plurality's view, were acting as the State, and since they were in a position to give Burch a hearing, and failed to do so, the State itself was in a position to provide predeprivation process, and failed to do so. Five judges dissented on the ground that the case was controlled by *Parratt* and *Hudson*. 840 F. 2d, at 810–814.

This Court granted certiorari to resolve the conflict—so evident in the divided views of the judges of the Eleventh Circuit—that has arisen in the Courts of Appeals over the proper scope of the *Parratt* rule.[2] 489 U. S. 1064 (1989).

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[2] Several Courts of Appeals have found *Parratt* inapplicable where the defendant state officials had the state-clothed authority to effect a deprivation and had the power to provide the plaintiff with a hearing before they did so. See, *e. g.*, *Watts* v. *Burkhart*, 854 F. 2d 839, 843 (CA6 1988); *Wilson* v. *Clayton*, 839 F. 2d 375, 382 (CA7 1988); *Fetner* v. *Roanoke*, 813 F. 2d 1183, 1185–1186 (CA11 1987); *Freeman* v. *Blair*, 793 F. 2d 166, 177 (CA8 1986); *Patterson* v. *Coughlin*, 761 F. 2d 886, 891–893 (CA2 1985), cert. denied, 474 U. S. 1100 (1986); *Bretz* v. *Kelman*, 773 F. 2d 1026, 1031 (CA9 1985) (en banc); *Wolfenbarger* v. *Williams*, 774 F. 2d 358, 363–365 (CA10 1985).

Other Courts of Appeals have held that *Parratt* applies even to deprivations effected by the very state officials charged with providing predeprivation process. See, *e. g.*, *Vinson* v. *Campbell County Fiscal Court*, 820

Because this case concerns the propriety of a Rule 12(b)(6) dismissal, the question before us is a narrow one. We decide only whether the *Parratt* rule necessarily means that Burch's complaint fails to allege any deprivation of due process, because he was constitutionally entitled to nothing more than what he received—an opportunity to sue petitioners in tort for his allegedly unlawful confinement. The broader questions of what procedural safeguards the Due Process Clause requires in the context of an admission to a mental hospital, and whether Florida's statutes meet these constitutional requirements, are not presented in this case. Burch did not frame his action as a challenge to the constitutional adequacy of Florida's mental health statutes. Both before the Eleventh Circuit and in his brief here, he disavowed any challenge to the statutes themselves and restricted his claim to the contention that petitioners' failure to provide constitutionally adequate safeguards in his case violated his due process rights.[3]

F. 2d 194, 199 (CA6 1987); *Holloway* v. *Walker*, 784 F. 2d 1287, 1292–1293 (CA5 1986); *Yates* v. *Jamison*, 782 F. 2d 1182, 1185 (CA4 1986); *Wadhams* v. *Procunier*, 772 F. 2d 75, 77–78 (CA4 1985); *Toney-El* v. *Franzen*, 777 F. 2d 1224, 1227–1228 (CA7 1985); *Collins* v. *King*, 743 F. 2d 248, 254 (CA5 1984).

In addition, the Courts of Appeals are divided on the question whether *Parratt* applies to deprivations of liberty as well as deprivations of property rights. Compare *McRorie* v. *Shimoda*, 795 F. 2d 780, 786 (CA9 1986), and *Conway* v. *Mount Kisco*, 758 F. 2d 46, 48 (CA2 1985), with *Wilson* v. *Beebe*, 770 F. 2d 578, 584 (CA6 1985) (en banc), *Toney-El* v. *Franzen*, 777 F. 2d, at 1227, and *Thibodeaux* v. *Bordelon*, 740 F. 2d 329, 337–339 (CA5 1984).

[3] See Brief for Respondent 6 ("Burch is not attacking the facial validity of Florida's voluntary admission procedures any more than he is attacking the facial validity of Florida's involuntary admission procedures").

Inasmuch as Burch does not claim that he was deprived of due process by an established state procedure, our decision in *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982), is not controlling. In that case, the plaintiff challenged not a state official's error in implementing state law, but "the 'established state procedure' that destroys his entitlement without according him proper procedural safeguards." *Id.*, at 436.

Burch apparently concedes that, if Florida's statutes were strictly complied with, no deprivation of liberty without due process would occur. If

II

A

For purposes of review of a Rule 12(b)(6) dismissal, the factual allegations of Burch's complaint are taken as true. Burch's complaint, and the medical records and forms attached to it as exhibits, provide the following factual background:

On December 7, 1981, Burch was found wandering along a Florida highway, appearing to be hurt and disoriented. He was taken to Apalachee Community Mental Health Services (ACMHS) in Tallahassee.[4] ACMHS is a private mental health care facility designated by the State to receive patients suffering from mental illness.[5] Its staff in their evaluation forms stated that, upon his arrival at ACMHS, Burch was hallucinating, confused, and psychotic and believed he was "in heaven." Exhibit B–1 to Complaint. His face and chest were bruised and bloodied, suggesting that he had fallen or had been attacked. Burch was asked to sign forms giving his consent to admission and treatment. He did so. He remained at ACMHS for three days, during which time the facility's staff diagnosed his condition as paranoid schizophrenia and gave him psychotropic medication. On December 10, the staff found that Burch was "in need of longer-term stabilization," Exhibit B–2 to Complaint, and referred him to FSH, a public hospital owned and operated by the State as a mental health treatment facility.[6] Later that day, Burch

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only those patients who are competent to consent to admission are allowed to sign themselves in as "voluntary" patients, then they would not be deprived of any liberty interest at all. And if all other patients—those who are incompetent and those who are unwilling to consent to admission—are afforded the protections of Florida's involuntary placement procedures, they would be deprived of their liberty only after due process.

[4] ACHMS was a named defendant in this case, but did not petition for certiorari.

[5] Under Fla. Stat. § 394.461(1) (1981), the State Department of Health and Rehabilitative Services may "designate any community facility as a receiving facility for emergency, short-term treatment and evaluation."

[6] See §§ 394.457(8) and 394.455(8).

signed forms requesting admission and authorizing treatment at FSH. Exhibits C–1 and C–2 to Complaint. He was then taken to FSH by a county sheriff.

Upon his arrival at FSH, Burch signed other forms for voluntary admission and treatment. One form, entitled "Request for Voluntary Admission," recited that the patient requests admission for "observation, diagnosis, care and treatment of [my] mental condition," and that the patient, if admitted, agrees "to accept such treatment as may be prescribed by members of the medical and psychiatric staff in accordance with the provisions of expressed and informed consent." Exhibit E–1 to Complaint. Two of the petitioners, Janet V. Potter and Marjorie R. Parker, signed this form as witnesses. Potter is an accredited records technician; Parker's job title does not appear on the form.

On December 23, Burch signed a form entitled "Authorization for Treatment." This form stated that he authorized "the professional staff of [FSH] to administer treatment, except electroconvulsive treatment"; that he had been informed of "the purpose of treatment; common side effects thereof; alternative treatment modalities; approximate length of care"; and of his power to revoke consent to treatment; and that he had read and fully understood the Authorization. Exhibit E–5 to Complaint. Petitioner Zinermon, a staff physician at FSH, signed the form as the witness.

On December 10, Doctor Zinermon wrote a "progress note" indicating that Burch was "refusing to cooperate," would not answer questions, "appears distressed and confused," and "related that medication has been helpful." Exhibit F–8 to Complaint. A nursing assessment form dated December 11 stated that Burch was confused and unable to state the reason for his hospitalization and still believed that "[t]his is heaven." Exhibits F–3 and F–4 to Complaint. Petitioner Zinermon on December 29 made a further report on Burch's condition, stating that, on admission, Burch had been "disoriented, semimute, confused and bizarre in appearance and thought," "not cooperative to the initial interview," and "extremely psychotic, appeared to be paranoid and hallucinating." The doctor's report also stated that Burch remained disoriented, delusional, and psychotic. Exhibit F–5 to Complaint.

Burch remained at FSH until May 7, 1982, five months after his initial admission to ACMHS. During that time, no hearing was held regarding his hospitalization and treatment.

After his release, Burch complained that he had been admitted inappropriately to FHS and did not remember signing a voluntary admission form. His complaint reached the Florida Human Rights Advocacy Committee of the State's Department of Health and Rehabilitation Services (Committee).[7] The Committee investigated and replied to Burch by letter dated April 4, 1984. The letter stated that Burch in fact had signed a voluntary admission form, but that there was "documentation that you were heavily medicated and disoriented on admission and . . . you were probably not competent to be signing legal documents." Exhibit G to Complaint. The letter also stated that, at a meeting of the Committee with FSH staff on August 4, 1983, "hospital administration was made aware that they were very likely asking medicated clients to make decisions at a time when they were not mentally competent." *Ibid.*

In February 1985, Burch filed a complaint in the United States District Court for the Northern District of Florida. He alleged, among other things, that ACMHS and the 11 individual petitioners, acting under color of Florida law, and "by and through the authority of their respective positions as employees at FSH . . . as part of their regular and official employment at FSH, took part in admitting Plaintiff to FSH as a 'voluntary' patient." App. to Pet. for Cert. 200.[8] Specifically, he alleged:

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[7] See § 20.19(6)(b)2 (creating statewide Human Rights Advocacy Committee of eight citizens, charged with "[r]eceiving, investigating, and resolving reports of abuse or deprivation of constitutional and human rights" concerning health care).

> "Defendants, and each of them, knew or should have known that Plaintiff was incapable of voluntary, knowing, understanding and informed consent to admission and treatment at FSH. See Exhibit G attached hereto and incorporated herein.[[9]] Nonetheless, Defendants, and each of them, seized Plaintiff and against Plaintiff's will confined and imprisoned him and subjected him to involuntary commitment and treatment for the period from December 10, 1981, to May 7, 1982. For said period of 149 days, Plaintiff was without the benefit of counsel and no hearing of any sort was held at which he could have challenged his involuntary admission and treatment at FSH.
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> ". . . Defendants, and each of them, deprived Plaintiff of his liberty without due process of law in contravention of the Fourteenth Amendment to the United States Constitution. Defendants acted with willful, wanton and reckless disregard of and indifference to Plaintiff's Constitutionally guaranteed right to due process of law." *Id.*, at 201–202.

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[8] Burch further alleged that petitioners' "respective roles in the 'voluntary' admission process are evidenced by admissions-related documents" attached as exhibits to the complaint. App. to Pet. for Cert. 200. The documents referred to are the request-for-admission and authorization-of-treatment forms described above, and other related forms.

[9] Exhibit G is the April 4, 1984, letter to Burch from the Human Rights Advocacy Committee. Two specially concurring judges of the Eleventh Circuit expressed the view that this exhibit served as an allegation of a hospital custom and practice of eliciting consent to admission from incompetent patients. 840 F. 2d 797, 808 (1988). Since the plurality opinion did not rely on this reading of Burch's complaint, we express no view as to whether the complaint with attached exhibits sufficed to state a custom and practice claim.

B

Burch's complaint thus alleges that he was admitted to and detained at FSH for five months under Florida's statutory provisions for "voluntary" admission. These provisions are part of a comprehensive statutory scheme under which a person may be admitted to a mental hospital in several different ways.[10]

First, Florida provides for short-term emergency admission. If there is reason to believe that a person is mentally ill and likely "to injure himself or others" or is in "need of care or treatment and lacks sufficient capacity to make a responsible application on his own behalf," he may immediately be detained for up to 48 hours. Fla. Stat. § 394.463(1)(a) (1981). A mental health professional, a law enforcement officer, or a judge may effect an emergency admission. After 48 hours, the patient is to be released unless he "voluntarily gives express and informed consent to evaluation or treatment," or a proceeding for court-ordered evaluation or involuntary placement is initiated. § 394.463(1)(d).

Second, under a court order a person may be detained at a mental health facility for up to five days for evaluation, if he is likely "to injure himself or others" or if he is in "need of care or treatment which, if not provided, may result in neglect or refusal to care for himself and . . . such neglect or refusal poses a real and present threat of substantial harm to his well-being." § 394.463(2)(a). Anyone may petition for a court-ordered evaluation of a person alleged to meet these criteria. After five days, the patient is to be released unless he gives "express and informed consent" to admission and treatment, or unless involuntary placement proceedings are initiated. § 394.463(2)(e).

Third, a person may be detained as an involuntary patient, if he meets the same criteria as for evaluation, and if the facility administrator and two mental health professionals recommend involuntary placement. §§394.467(1) and (2). Before involuntary placement, the patient has a right to notice, a judicial hearing, appointed counsel, access to medical records and personnel, and an independent expert examination. §394.467(3). If the court determines that the patient meets the criteria for involuntary placement, it then decides whether the patient is competent to consent to treatment. If not, the court appoints a guardian advocate to make treatment decisions. §394.467(3)(a). After six months, the facility must either release the patient, or seek a court order for continued placement by stating the reasons therefor, summarizing the patient's treatment to that point, and submitting a plan for future treatment. §§394.467(3) and (4).

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[10] We describe the statutory scheme as it existed in 1980–1981, when Burch was confined at FSH. The statutes have been amended since then in details not relevant for present purposes.

Finally, a person may be admitted as a voluntary patient. Mental hospitals may admit for treatment any adult "making application by express and informed consent," if he is "found to show evidence of mental illness and to be suitable for treatment." §394.465(1)(a). "Express and informed consent" is defined as "consent voluntarily given in writing after sufficient explanation and disclosure . . . to enable the person . . . to make a knowing and willful decision without any element of force, fraud, deceit, duress, or other form of constraint or coercion." §394.455(22). A voluntary patient may request discharge at any time. If he does, the facility administrator must either release him within three days or initiate the involuntary placement process. §394.465(2)(a). At the time of his admission and each six months thereafter, a voluntary patient and his legal guardian or representatives must be notified in writing of the right to apply for a discharge. §394.465(3).

Burch, in apparent compliance with §394.465(1), was admitted by signing forms applying for voluntary admission. He alleges, however, that petitioners violated this statute in admitting him as a voluntary patient, because they knew or should have known that he was incapable of making an in-

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Burch, in apparent compliance with § 394.465(1), was admitted by signing forms applying for voluntary admission. He alleges, however, that petitioners violated this statute in admitting him as a voluntary patient, because they knew or should have known that he was incapable of making an informed decision as to his admission. He claims that he was entitled to receive the procedural safeguards provided by Florida's involuntary placement procedure, and that petitioners violated his due process rights by failing to initiate this procedure. The question presented is whether these allegations suffice to state a claim under § 1983, in light of *Parratt* and *Hudson*.

III

A

To understand the background against which this question arises, we return to the interpretation of § 1983 articulated in *Monroe* v. *Pape*, 365 U. S. 167 (1961) (overruled in part not relevant here, by *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658, 664–689 (1978)). In *Monroe*, this Court rejected the view that § 1983 applies only to violations of constitutional rights that are authorized by state law, and does not reach abuses of state authority that are forbidden by the State's statutes or Constitution or are torts under the State's common law. It explained that § 1983 was intended not only to "override" discriminatory or otherwise unconstitutional state laws, and to provide a remedy for violations of civil rights "where state law was inadequate," but also to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice." 365 U. S., at 173–174. The Court said:

> "It is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." *Id.*, at 183.

Thus, overlapping state remedies are generally irrelevant to the question of the existence of a cause of action under § 1983. A plaintiff, for example, may bring a § 1983 action for an unlawful search and seizure despite the fact that the search and seizure violated the State's Constitution or statutes, and despite the fact that there are common-law remedies for trespass and conversion. As was noted in *Monroe,* in many cases there is "no quarrel with the state laws on the books," *id.*, at 176; instead, the problem is the way those laws are or are not implemented by state officials.

This general rule applies in a straightforward way to two of the three kinds of § 1983 claims that may be brought against the State under the Due Process Clause of the Fourteenth Amendment. First, the Clause incorporates many of the specific protections defined in the Bill of Rights. A plaintiff may bring suit under § 1983 for state officials' violation of his rights to, *e. g.*, freedom of speech or freedom from unreasonable searches and seizures. Second, the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions "regardless of the fairness of the procedures used to implement them." *Daniels* v. *Williams*, 474 U. S., at 331. As to these two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. *Id.*, at 338 (STEVENS, J., concurring in judgments). A plaintiff, under *Monroe* v. *Pape*, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.

The Due Process Clause also encompasses a third type of protection, a guarantee of fair procedure. A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies *is* relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest in "life, liberty, or property" is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*. *Parratt*, 451 U. S., at 537; *Carey* v. *Piphus*, 435 U. S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property").[11] The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Therefore, to determine whether a constitutional violation has occurred, it is necessary to ask what process the State provided, and whether it was constitutionally adequate. This inquiry would examine the procedural safeguards built into the statutory or administrative procedure of effecting the deprivation, and any remedies for erroneous deprivations provided by statute or tort law.

In this case, Burch does not claim that his confinement at FSH violated any of the specific guarantees of the Bill of Rights.[12] Burch's complaint could be read to include a substantive due process claim, but that issue was not raised in the petition for certiorari, and we express no view on whether the facts Burch alleges could give rise to such a claim.[13] The claim at issue falls within the third, or procedural, category of § 1983 claims based on the Due Process Clause.

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[11] The Court in *Carey* v. *Piphus* explained that a deprivation of procedural due process is actionable under § 1983 without regard to whether the same deprivation would have taken place even in the presence of proper procedural safeguards. 435 U. S., at 266 (even if the deprivation was in fact justified, so the plaintiffs did not suffer any "other actual injury" caused by the lack of due process, "the fact remains that they were deprived of their right to procedural due process"). It went on to say, however, that in cases where the deprivation would have occurred anyway, and the lack of due process did not itself cause any injury (such as emotional distress), the plaintiff may recover only nominal damages. *Id.*, at 264, 266.

[12] One concurring judge of the Eleventh Circuit expressed the view that Burch's complaint stated a claim for an unreasonable seizure in violation of Fourth Amendment protections. 840 F. 2d, at 807–808. Burch has not pursued this theory, however, and we do not address it.

[13] Five specially concurring judges of the Eleventh Circuit found Burch's complaint sufficient to state a substantive due process claim. *Id.*, at 803–804. The remainder of the en banc court either did not reach the issue, *id.*, at 807 (Clark, J., concurring), or took the view that Burch did not state such a claim, and that even if he had, the admission and treatment of a mentally ill person apparently willing to be admitted are not the sort of inherently wrongful and arbitrary state action that would constitute a sub-

B

Due process, as this Court often has said, is a flexible concept that varies with the particular situation. To determine what procedural protections the Constitution requires in a particular case, we weigh several factors:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976).

Applying this test, the Court usually has held that the Constitution requires some kind of a hearing *before* the State deprives a person of liberty or property. See, *e. g.*, *Cleveland Board of Education* v. *Loudermill*, 470 U. S. 532, 542 (1985) ("'[T]he root requirement' of the Due Process Clause" is "'that an individual be given an opportunity for a hearing *before* he is deprived of any significant protected interest'"; hearing required before termination of employment (emphasis in original)); *Parham* v. *J. R.*, 442 U. S. 584, 606–607 (1979) (determination by neutral physician whether statutory admission standard is met required before confinement of child in mental hospital); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U. S. 1, 18 (1978) (hearing required before cutting off utility service); *Goss* v. *Lopez*, 419 U. S. 565, 579 (1975) (at minimum, due process requires "*some* kind of notice and . . . *some* kind of hearing" (emphasis in original); informal hearing required before suspension of students from

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stantive due process violation. *Id.*, at 809 (Anderson, J., concurring specially); *id.*, at 815–817 (dissenting opinion for five judges).

public school); *Wolff* v. *McDonnell*, 418 U. S. 539, 557–558 (1974) (hearing required before forfeiture of prisoner's good-time credits); *Fuentes* v. *Shevin*, 407 U. S. 67, 80–84 (1972) (hearing required before issuance of writ allowing repossession of property); *Goldberg* v. *Kelly*, 397 U. S. 254, 264 (1970) (hearing required before termination of welfare benefits).

In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. See, *e. g.*, *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 436 (1982) ("'[T]he necessity of quick action by the State or the impracticality of providing any predeprivation process'" may mean that a postdeprivation remedy is constitutionally adequate, quoting *Parratt*, 451 U. S., at 539); *Memphis Light*, 436 U. S., at 19 ("[W]here the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the procedures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham* v. *Wright*, 430 U. S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell* v. *W. T. Grant Co.*, 416 U. S. 600, 619–620 (1974) (hearing not required before issuance of writ to sequester debtor's property).

This is where the *Parratt* rule comes into play. *Parratt* and *Hudson* represent a special case of the general *Mathews* v. *Eldridge* analysis, in which postdeprivation tort remedies are all the process that is due, simply because they are the only remedies the State could be expected to provide. In *Parratt*, a state prisoner brought a § 1983 action because prison employees negligently had lost materials he had ordered by mail.[14] The prisoner did not dispute that he had a postdeprivation remedy. Under state law, a tort-claim procedure was available by which he could have recovered the value of the materials. 451 U. S., at 543–544. This Court ruled that the tort remedy was all the process the prisoner was due, because any predeprivation procedural safeguards that the State did provide, or could have provided, would not address the risk of *this kind* of deprivation. The very nature of a negligent loss of property made it impossible for the State to predict such deprivations and provide predeprivation process. The Court explained:

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[14] *Parratt* was decided before this Court ruled, in *Daniels* v. *Williams*, 474 U. S. 327, 336 (1986), that a negligent act by a state official does not give rise to § 1983 liability.

> "The justifications which we have found sufficient to uphold takings of property without any predeprivation process are applicable to a situation such as the present one involving a tortious loss of a prisoner's property as a result of a random and unauthorized act by a state employee. In such a case, the loss is not a result of some established state procedure and the State cannot predict precisely when the loss will occur. It is difficult to conceive of how the State could provide a meaningful hearing before the deprivation takes place." *Id.*, at 541.

Given these special circumstances, it was clear that the State, by making available a tort remedy that could adequately redress the loss, had given the prisoner the process he was due. Thus, *Parratt* is not an exception to the *Mathews* balancing test, but rather an application of that test to the unusual case in which one of the variables in the *Mathews* equation—the value of predeprivation safeguards—is negligible in preventing the kind of deprivation at issue. Therefore, no matter how significant the private interest at stake and the risk of its erroneous deprivation, see *Mathews*, 424 U. S., at 335, the State cannot be required constitutionally to do the impossible by providing predeprivation process.

In *Hudson*, the Court extended this reasoning to an intentional deprivation of property. A prisoner alleged that, during a search of his prison cell, a guard deliberately and maliciously destroyed some of his property, including legal papers. Again, there was a tort remedy by which the prisoner could have been compensated. 468 U. S., at 534–535. In *Hudson*, as in *Parratt*, the state official was not acting pursuant to any established state procedure, but, instead, was apparently pursuing a random, unauthorized personal vendetta against the prisoner. 468 U. S., at 521, n. 2, 532. The Court pointed out: "The state can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct." *Id.*, at 533. Of course, the fact that the guard's conduct was intentional meant that he himself could "foresee" the wrongful deprivation and could prevent it simply by refraining from his misconduct. Nonetheless, the Court found that an individual state employee's ability to foresee the deprivation is "of no consequence," because the proper inquiry under *Parratt* is "whether the *state* is in a position to provide for predeprivation process." 468 U. S., at 534 (emphasis added).

C

Petitioners argue that the dismissal under Rule 12(b)(6) was proper because, as in *Parratt* and *Hudson*, the State could not possibly have provided predeprivation process to prevent the kind of "random, unauthorized" wrongful deprivation of liberty Burch alleges, so the postdeprivation remedies provided by Florida's statutory and common law necessarily are all the process Burch was due.[15]

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[15] Burch does not dispute that he had remedies under Florida law for unlawful confinement. Florida's mental health statutes provide that a patient confined unlawfully may sue for damages. § 394.459(13) ("Any person who violates or abuses any rights or privileges of patients" is liable for damages, subject to good-faith immunity but not immunity for negligence). Also, a mental patient detained at a mental health facility, or a person acting on his behalf, may seek a writ of habeas corpus to "question the cause and legality of such detention and request . . . release." § 394.459(10)(a). Finally, Florida recognizes the common-law tort of false imprisonment. *Johnson* v. *Weiner*, 155 Fla. 169, 19 So. 2d 699 (1944).

Before turning to that issue, however, we must address a threshold question raised by Burch. He argues that *Parratt* and *Hudson* cannot apply to his situation, because those cases are limited to deprivations of property, not liberty.[16]

Burch alleges that he was deprived of his liberty interest in avoiding confinement in a mental hospital without either informed consent[17] or the procedural safeguards of the involuntary placement process. Petitioners do not seriously dispute that there is a substantial liberty interest in avoiding confinement in a mental hospital. See *Vitek* v. *Jones,* 445 U. S. 480, 491–492 (1980) (commitment to mental hospital entails "'a massive curtailment of liberty,'" and requires due process protection); *Parham* v. *J. R.*, 442 U. S., at 600 (there is a "substantial liberty interest in not being confined unnecessarily for medical treatment"); *Addington* v. *Texas,* 441 U. S. 418, 425 (1979) ("[C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection"); *Jackson* v. *Indiana,* 406 U. S. 715, 738 (1972) (due process requires at least that the nature and duration of commitment to a mental hospital "bear some reasonable relation to the purpose" of the commitment). Burch's confinement at FSH for five months without a hearing or any other procedure to determine either that he validly had consented to admission, or that he met the statutory standard for involuntary placement, clearly infringes on this liberty interest.

Burch argues that postdeprivation tort remedies are *never* constitutionally adequate for a deprivation of liberty, as opposed to property, so the *Parratt* rule cannot apply to this case. We, however, do not find support in precedent for a categorical distinction between a deprivation of liberty and one of property. See *Lynch* v. *Household Finance Corp.*, 405 U. S. 538, 552 (1972) ("[T]he dichotomy between personal liberties and property rights is a false one"); *Wolff*, 418 U. S., at 557–558 (a hearing is generally required before final deprivation of property interests, and "a person's liberty is equally protected"). In *Parratt* itself, the Court said, 451 U. S., at 542, that its analysis was "quite consistent with the approach taken" in *Ingraham* v. *Wright*, 430 U. S. 651 (1977), a liberty interest case.

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[16] Some Courts of Appeals have limited the application of *Parratt* and *Hudson* to deprivations of property. See n. 2, *supra.*

[17] Of course, if Burch had been competent to consent to his admission and treatment at FSH, there would have been no deprivation of his liberty at all. The State simply would have been providing Burch with the care and treatment he requested. Burch alleges, however, that he was not competent, so his apparent willingness to sign the admission forms was legally meaningless.

It is true that *Parratt* and *Hudson* concerned deprivations of property. It is also true that Burch's interest in avoiding five months' confinement is of an order different from inmate Parratt's interest in mail-order materials valued at $23.50. But the reasoning of *Parratt* and *Hudson* emphasizes the State's inability to provide predeprivation process because of the random and unpredictable nature of the deprivation, not the fact that only property losses were at stake. In situations where the State feasibly can provide a predeprivation hearing before taking property, it generally must do so regardless of the adequacy of a postdeprivation tort remedy to compensate for the taking. See *Loudermill*, 470 U. S., at 542; *Memphis Light*, 436 U. S., at 18; *Fuentes*, 407 U. S., at 80–84; *Goldberg*, 397 U. S., at 264. Conversely, in situations where a predeprivation hearing is unduly burdensome in proportion to the liberty interest at stake, see *Ingraham*, 430 U. S., at 682, or where the State is truly unable to anticipate and prevent a random deprivation of a liberty interest, postdeprivation remedies might satisfy due process. Thus, the fact that a deprivation of liberty is involved in this case does not automatically preclude application of the *Parratt* rule.

To determine whether, as petitioners contend, the *Parratt* rule necessarily precludes § 1983 liability in this case, we must ask whether predeprivation procedural safeguards could address the risk of deprivations of the kind Burch alleges. To do this, we examine the risk involved. The risk is that some persons who come into Florida's mental health facilities will apparently be willing to sign forms authorizing admission and treatment, but will be incompetent to give the "express and informed consent" required for voluntary placement under § 394.465(1)(a). Indeed, the very nature of mental illness makes it foreseeable that a person needing mental health care will be unable to understand any proffered "explanation and disclosure of the subject matter" of the forms that person is asked to sign, and will be unable "to make a knowing and willful decision" whether to consent to admission.[18] § 394.455(22) (definition of informed consent). A person who is willing to sign forms but is incapable of making an informed decision is, by the same token, unlikely to benefit from the voluntary patient's statutory right to request discharge. See § 394.465(2)(a). Such a person thus is in danger of being confined indefinitely without benefit of the procedural safeguards of the involuntary placement process, a process specifically designed to protect persons incapable of looking after their own interests. See §§ 394.467(2) and (3) (providing for notice, judicial hearing, counsel, examination by independent expert, appointment of guardian advocate, etc.).

Persons who are mentally ill and incapable of giving informed consent to admission would not necessarily meet the statutory standard for involuntary placement, which requires either that they are likely to injure themselves or others, or that their neglect or refusal to care for themselves threatens their well-being. See § 394.467(1)(b). The involuntary placement process serves to guard against the confinement of a person who, though mentally ill, is harmless and can live safely outside an institution. Confinement of such a person not only violates Florida law, but also is unconstitutional. *O'Connor* v. *Donaldson*, 422 U. S. 563, 575 (1975) (there is no constitutional basis for confining mentally ill persons involuntarily "if they are dangerous to no one and can live safely in freedom"). Thus, it is at least possible that if Burch had had an involuntary placement hearing, he would not have been found to meet the statutory standard for involuntary placement and would not have been confined at FSH. Moreover, even assuming that Burch would have met the statutory requirements for involuntary placement, he still could have been harmed by being deprived of other protections built into the involuntary placement procedure, such as the appointment of a guardian advocate to make treatment decisions and periodic judicial review of placement. §§ 394.467(3) and (4).[19]

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[18] The characteristics of mental illness thus create special problems regarding informed consent. Even if the State usually might be justified in taking at face value a person's request for admission to a hospital for medical treatment, it may not be justified in doing so, without further inquiry, as to a mentally ill person's request for admission and treatment at a mental hospital.

The very risks created by the application of the informed-consent requirement to the special context of mental health care are borne out by the facts alleged in this case. It appears from the exhibits accompanying Burch's complaint that he was simply given admission forms to sign by clerical workers, and, after he signed, was considered a voluntary patient. Burch alleges that petitioners knew or should have known that he was incapable of informed consent. This allegation is supported, at least as to petitioner Zinermon, by the psychiatrist's admission notes, described above, on Burch's mental state. Thus, the way in which Burch allegedly was admitted to FSH certainly did not ensure compliance with the statutory standard for voluntary admission.

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[19] Hence, Burch might be entitled to actual damages, beyond the nominal damages awardable for a procedural due process violation unaccompanied by any actual injury, see *Carey* v. *Piphus*, 435 U. S. 247, 266–267 (1978), if he can show either that if the proper procedure had been followed he would have remained at liberty and that he suffered harm by being confined, or that even if he would have been committed anyway under the involuntary placement procedure, the lack of this procedure harmed him in some way.

We now consider whether predeprivation safeguards would have any value in guarding against the kind of deprivation Burch allegedly suffered. Petitioners urge that here, as in *Parratt* and *Hudson*, such procedures could have no value at all, because the State cannot prevent its officials from making random and unauthorized errors in the admission process. We disagree.

The Florida statutes, of course, do not allow incompetent persons to be admitted as "voluntary" patients. But the statutes do not direct any member of the facility staff to determine whether a person is competent to give consent, nor to initiate the involuntary placement procedure for every incompetent patient. A patient who is willing to sign forms but incapable of informed consent certainly cannot be relied on to protest his "voluntary" admission and demand that the involuntary placement procedure be followed. The staff are the *only* persons in a position to take notice of any misuse of the voluntary admission process and to ensure that the proper procedure is followed.

Florida chose to delegate to petitioners a broad power to admit patients to FSH, *i. e.*, to effect what, in the absence of informed consent, is a substantial deprivation of liberty. Because petitioners had state authority to deprive persons of liberty, the Constitution imposed on them the State's concomitant duty to see that no deprivation occurs without adequate procedural protections.

It may be permissible constitutionally for a State to have a statutory scheme like Florida's, which gives state officials broad power and little guidance in admitting mental patients. But when those officials fail to provide constitutionally required procedural safeguards to a person whom they deprive of liberty, the state officials cannot then escape liability by invoking *Parratt* and *Hudson*. It is immaterial whether the due process violation Burch alleges is best described as arising from petitioners' failure to comply with state procedures for admitting involuntary patients, or from the absence of a specific requirement that petitioners determine whether a patient is competent to consent to voluntary admission. Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws. Burch is not simply attempting to blame the State for misconduct by its employees. He seeks to hold state officials accountable for their abuse of their broadly delegated, uncircumscribed power to effect the deprivation at issue.

This case, therefore, is not controlled by *Parratt* and *Hudson*, for three basic reasons:

First, petitioners cannot claim that the deprivation of Burch's liberty was unpredictable. Under Florida's statutory scheme, only a person competent to give informed consent may be admitted as a voluntary patient. There is, however, no specified way of determining, before a patient is asked to sign admission forms, whether he is competent. It is hardly unforeseeable that a person requesting treatment for mental illness might be incapable of informed consent, and that state officials with the power to admit patients might take their apparent willingness to be admitted at face value and not initiate involuntary placement procedures. Any erroneous deprivation will occur, if at all, at a specific, predictable point in the admission process—when a patient is given admission forms to sign.

This situation differs from the State's predicament in *Parratt*. While it could anticipate that prison employees would occasionally lose property through negligence, it certainly "cannot predict precisely when the loss will occur." 451 U. S., at 541. Likewise, in *Hudson*, the State might be able to predict that guards occasionally will harass or persecute prisoners they dislike, but cannot "know when such deprivations will occur." 468 U. S., at 533.

Second, we cannot say that predeprivation process was impossible here. Florida already has an established procedure for involuntary placement. The problem is only to ensure that this procedure is afforded to all patients who cannot be admitted voluntarily, both those who are unwilling and those who are unable to give consent.

In *Parratt*, the very nature of the deprivation made predeprivation process "impossible." 451 U. S., at 541. It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it "borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct." *Daniels*, 474 U. S., at 342, n. 19 (STEVENS, J., concurring in judgments). In *Hudson*, the errant employee himself could anticipate the deprivation since he intended to effect it, but the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intentional conduct. 468 U. S., at 533–534. Again, a rule forbidding a prison guard to maliciously destroy a prisoner's property would not have done any good; it would be absurd to suggest that the State hold a hearing to determine whether a guard should engage in such conduct.

Here, in contrast, there is nothing absurd in suggesting that, had the State limited and guided petitioners' power to admit patients, the deprivation might have been averted. Burch's complaint alleges that petitioners "knew or should have known" that he was incompetent, and nonetheless admitted him as a voluntary patient in "willful, wanton, and reckless disregard" of his constitutional rights. App. to Pet. for Cert. 201–202. Understood in context, the allegation means only that petitioners disregarded their duty to ensure that the proper procedures were followed, not that they, like the prison guard in *Hudson*, were bent upon effecting the substantive deprivation and would have done so despite any and all predeprivation safeguards. Moreover, it would indeed be strange to allow state officials to escape § 1983 liability for failing to provide constitutionally required procedural protections by assuming that those procedures would be futile because the same state officials would find a way to subvert them.

Third, petitioners cannot characterize their conduct as "unauthorized" in the sense the term is used in *Parratt* and *Hudson*. The State delegated to them the power and authority to effect the very deprivation complained of here, Burch's confinement in a mental hospital, and also delegated to them the concomitant duty to initiate the procedural safeguards set up by state law to guard against unlawful confinement. In *Parratt* and *Hudson*, the state employees had no similar broad authority to deprive prisoners of their personal property, and no similar duty to initiate (for persons unable to protect their own interests) the procedural safeguards required before deprivations occur. The deprivation here is "unauthorized" only in the sense that it was not an act sanctioned by state law, but, instead, was a "depriv[ation] of constitutional rights . . . by an official's abuse of his position." *Monroe*, 365 U. S., at 172.[20]

We conclude that petitioners cannot escape § 1983 liability by characterizing their conduct as a "random, unauthorized" violation of Florida law which the State was not in a position to predict or avert, so that all the process Burch could possibly be due is a postdeprivation damages remedy. Burch, according to the allegations of his complaint, was deprived of a substantial liberty interest without either valid consent or an involuntary placement hearing, by the very state officials charged with the power to deprive mental patients of their liberty and the duty to implement procedural safeguards.

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[20] Contrary to the dissent's view of *Parratt* and *Hudson*, those cases do not stand for the proposition that in every case where a deprivation is caused by an "unauthorized . . . departure from established practices," *post*, at 146, state officials can escape § 1983 liability simply because the State provides tort remedies. This reading of *Parratt* and *Hudson* detaches those cases from their proper role as special applications of the settled principles expressed in *Monroe* and *Mathews*.

Such a deprivation is foreseeable, due to the nature of mental illness, and will occur, if at all, at a predictable point in the admission process. Unlike *Parratt* and *Hudson*, this case does not represent the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due because no predeprivation safeguards would be of use in preventing the kind of deprivation alleged.

We express no view on the ultimate merits of Burch's claim; we hold only that his complaint was sufficient to state a claim under § 1983 for violation of his procedural due process rights.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY join, dissenting.

Without doubt, respondent Burch alleges a serious deprivation of liberty; yet equally clearly he alleges no violation of the Fourteenth Amendment. The Court concludes that an allegation of state actors' wanton, unauthorized departure from a State's established policies and procedures, working a deprivation of liberty, suffices to support a procedural due process claim even though the State provides adequate postdeprivation remedies for that deprivation. The Court's opinion unnecessarily transforms well-established procedural due process doctrine and departs from controlling precedent. I respectfully dissent.

Parratt v. *Taylor*, 451 U. S. 527 (1981), and *Hudson* v. *Palmer*, 468 U. S. 517 (1984), should govern this case. Only by disregarding the gist of Burch's complaint—that state actors' wanton and unauthorized departure from established practice worked the deprivation—and by transforming the allegations into a challenge to the adequacy of Florida's admissions procedures can the Court attempt to distinguish this case from *Parratt* and *Hudson*.

Burch alleges a deprivation occasioned by petitioners' contravention of Florida's established procedures. Florida allows the voluntary admission process to be employed to admit to its mental hospitals only patients who have made "application by express and informed consent for admission," and requires that the elaborate involuntary admission process be used to admit patients requiring treatment and incapable of giving such consent. See Fla. Stat. §§ 394.465, 394.467 (1981). Burch explicitly disavows any challenge to the adequacy of those established procedural safeguards accompanying Florida's two avenues of admission to mental hospitals. See Brief for Respondent 5 ("[T]he constitutional adequacy of Florida's voluntary admission and treatment procedures has never been an issue in this case since Burch was committed as an involuntary patient for purposes of this appeal"); *id.*, at 6 ("Burch is not attacking the facial validity of Florida's voluntary admission procedures any more than he is attacking the facial validity of Florida's involuntary admission procedures"). Nor does the complaint allege any widespread practice of subverting the State's procedural safeguards. Burch instead claims that in his case petitioners wrongfully employed the voluntary admission process deliberately or recklessly to deny him the hearing that Florida requires state actors to provide, through the involuntary admission process, to one in his position. He claims that petitioners "knew or should have known" that he was incapable of consent but "with willful, wanton and reckless disregard of and indifference to" his constitutional rights "subjected him to involuntary commitment" without any hearing "at which he could have challenged his involuntary admission and treatment." App. to Pet. for Cert. 200–202 (complaint); see Brief for Respondent i, n. 1 ("The complaint alleges an intentional, involuntary commitment of Respondent by Petitioners . . ."). Consistent with his disavowal of any attack upon the adequacy of the State's established procedures, Burch alleges that petitioners flagrantly and at least recklessly contravened those requirements. In short, Burch has alleged that petitioners' unauthorized actions worked the deprivation of his liberty.

Parratt and *Hudson* should readily govern procedural due process claims such as respondent's. Taken together, the decisions indicate that for deprivations worked by such random and unauthorized departures from otherwise unimpugned and established state procedures the State provides the process due by making available adequate postdeprivation remedies. In *Parratt*, the Court addressed a deprivation which "occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U. S., at 543. The random nature of the state actor's unauthorized departure made it not "practicable for the State to provide a predeprivation hearing," *ibid.*, and adequate postdeprivation remedies available through the State's tort system provided the process due under the Fourteenth Amendment. *Hudson* applied this reasoning to intentional deprivations by state actors and confirmed the distinction between deprivation pursuant to "an established state procedure" and that pursuant to "random and unauthorized action." 468 U. S., at 532–533; cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422, 435–436 (1982). In *Hudson*, the Court explained that the *Parratt* doctrine was applicable because "the *state* cannot possibly know in advance of a negligent deprivation of property," and that "[t]he controlling inquiry is solely whether the state is in a position to provide for predeprivation process." 468 U. S., at 534.

Application of *Parratt* and *Hudson* indicates that respondent has failed to state a claim allowing recovery under 42 U. S. C. § 1983 (1982 ed.). Petitioners' actions were unauthorized: they are alleged to have wrongly and without license departed from established state practices. Cf. *Hudson*, *supra*, at 532–533; *Parratt*, *supra*, at 543. Florida officials in a position to establish safeguards commanded that the voluntary admission process be employed only for consenting patients and that the involuntary hearing procedures be used to admit unconsenting patients. Yet it is alleged that petitioners "with willful, wanton and reckless disregard of and indifference to" Burch's rights contravened both commands. As in *Parratt*, the deprivation "occurred as a result of the unauthorized failure of agents of the State to follow established state procedure." 451 U. S., at 543. The wanton or reckless nature of the failure indicates it to be random. The State could not foresee the particular contravention and was hardly "in a position to provide for predeprivation process," *Hudson*, *supra*, at 534, to ensure that officials bent upon subverting the State's requirements would in fact follow those procedures. For this wrongful deprivation resulting from an unauthorized departure from established state practice, Florida provides adequate postdeprivation remedies, as two courts below concluded, and which the Court and respondent do not dispute. *Parratt* and *Hudson* thus should govern this case and indicate that respondent has failed to allege a violation of the Fourteenth Amendment.

The allegedly wanton nature of the subversion of the state procedures underscores why the State cannot in any relevant sense anticipate and meaningfully guard against the random and unauthorized actions alleged in this case. The Court suggests that the State could foresee "that a person requesting treatment for mental illness might be incapable of informed consent." *Ante*, at 136. While foreseeability of that routine difficulty in evaluating prospective patients is relevant in considering the general adequacy of Florida's voluntary admission procedures, *Parratt* and *Hudson* address whether the State can foresee and thus be required to forestall the deliberate or reckless departure from established state practice. Florida may be able to predict that over time some state actors will subvert its clearly implicated requirements. Indeed, that is one reason that the State must implement an adequate remedial scheme. But Florida "cannot predict precisely when the loss will occur," *Parratt*, *supra*, at

541, and the Due Process Clause does not require the State to do more than establish appropriate remedies for any wrongful departure from its prescribed practices.

The Court attempts to avert the force of *Parratt* and *Hudson* by characterizing petitioners' alleged failures as only the routine but erroneous application of the admission process. According to the Court, Burch suffered an "erroneous deprivation," *ante*, at 136, and the "risk of deprivations of the kind Burch alleges" is that incompetent "persons who come into Florida's mental health facilities will apparently be willing to sign forms," *ante*, at 133, prompting officials to "mak[e] random and unauthorized errors in the admission process," *ante*, at 135. The Court's characterization omits petitioners' alleged wrongful state of mind and thus the nature and source of the wrongful deprivation.

A claim of negligence will not support a procedural due process claim, see *Daniels* v. *Williams*, 474 U. S. 327 (1986), and it is an unresolved issue whether an allegation of gross negligence or recklessness suffices, *id.*, at 334, n. 3. Respondent, if not the Court, avoids these pitfalls. According to Burch, petitioners "knew" him to be incompetent or were presented with such clear evidence of his incompetence that they should be charged with such knowledge. App. to Pet. for Cert. 201. Petitioners also knew that Florida law required them to provide an incompetent prospective patient with elaborate procedural safeguards. Far from alleging inadvertent or negligent disregard of duty, respondent alleges that petitioners "acted with willful, wanton and reckless disregard of and indifference" to his rights by treating him without providing the hearing that Florida requires. *Id.*, at 202. That is, petitioners did not bumble or commit "errors" by taking Burch's "apparent willingness to be admitted at face value." *Ante*, at 135, 136. Rather, they deliberately or recklessly subverted his rights and contravened state requirements.

The unauthorized and wrongful character of the departure from established state practice makes additional procedures an "impracticable" means of preventing the deprivation. "The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson*, 468 U. S., at 533; see *Parratt, supra,* at 541. The Court suggests that additional safeguards surrounding the voluntary admission process would have quite possibly reduced the risk of deprivation. *Ante,* at 135–137. This reasoning conflates the value of procedures for preventing error in the repeated and usual case (evaluated according to the test set forth in *Mathews* v. *Eldridge,* 424 U. S. 319 (1976)) with the value of additional predeprivation procedures to forestall deprivations by state actors bent upon departing from, or indifferent to, complying with established practices. Unsurprisingly, the Court is vague regarding how its proffered procedures would prevent the deprivation Burch alleges, and why the safeguards would not form merely one more set of procedural protections that state employees could willfully, recklessly, and wantonly subvert. Indeed, Burch alleges that, presented with the clearest evidence of his incompetence, petitioners nonetheless wantonly or recklessly denied him the protections of the State's admission procedures and requirements. The state actor so indifferent to guaranteed protections would be no more prevented from working the deprivation by additional procedural requirements than would the mail handler in *Parratt* or the prison guard in *Hudson.* In those cases, the State could have, and no doubt did, provide a range of predeprivation requirements and safeguards guiding both prison searches and care of packages. See *Parratt,* 451 U. S., at 530; *id.,* at 543 ("[T]he deprivation occurred as a result of the unauthorized failure of agents of the State to follow established state procedure. There is no contention that the procedures themselves are inadequate . . ."). In all three cases, the unpredictable, wrongful departure is beyond the State's reasonable control. Additional safeguards designed to secure correct results in the usual case do not practicably forestall state actors who flout the State's command and established practice.

Even indulging the Court's belief that the proffered safeguards would provide "some" benefit, *Parratt* and *Hudson* extend beyond circumstances in which procedural safeguards would have had "negligible" value. *Ante,* at 129. In *Parratt* and *Hudson* additional measures would conceivably have had some benefit in preventing the alleged deprivations. A practice of barring individual or unsupervised shakedown searches, a procedure of always pairing or monitoring guards, or a requirement that searches be conducted according to "an established policy" (the proposed measure rejected as unnecessary in *Hudson, supra,* at 528–530) might possibly have helped to prevent the type of deprivation considered in *Hudson.* More sensible staffing practices, better training, or a more rigorous tracking procedure may have averted the deprivation at issue in *Parratt.* In those cases, like this one, the State knew the exact context in which the wrongful deprivation would occur. Yet the possibility of implementing such marginally beneficial measures, in light of the type of alleged deprivation, did not alter the analysis. The State's inability to foresee and to forestall the wrongful departure from established procedures renders additional predeprivation measures "impracticable" and not required by the dictates of due process. See *Hudson, supra,* at 533; *Parratt, supra,* at 541.

Every command to act imparts the duty to exercise discretion in accord with the command and affords the opportunity to abuse that discretion. The *Mathews* test measures whether the State has sufficiently constrained discretion in the usual case, while the *Parratt* doctrine requires the State to provide a remedy for any wrongful abuse. The Court suggests that this case differs from *Parratt* and *Hudson* because petitioners possessed a sort of delegated power. See *ante,* at 135–138. Yet petitioners no more had the delegated power to depart from the admission procedures and requirements than did the guard in *Hudson* to exceed the limits of his established search and seizure authority, or the prison official in *Parratt* wrongfully to withhold or misdeliver mail. Petitioners' delegated duty to act in accord with Florida's admission procedures is akin to the mail handler's duty to follow and implement the procedures surrounding delivery of packages, or the guard's duty to conduct the search properly. In the appropriate circumstances and pursuant to established procedures, the guard in *Hudson* was charged with seizing property pursuant to a search. The official in *Parratt* no doubt possessed some power to withhold certain packages from prisoners. *Parratt* and *Hudson* distinguish sharply between deprivations caused by unauthorized acts and those occasioned by established state procedures. See *Hudson*, *supra*, at 532; *Parratt*, *supra*, at 541; accord, *Logan*, 455 U. S., at 435–436. The delegation argument blurs this line and ignores the unauthorized nature of petitioners' alleged departure from established practices.

The suggestion that the State delegated to petitioners insufficiently trammeled discretion conflicts with positions that the Court ostensibly embraces. The issue whether petitioners possessed undue discretion is bound with, and more properly analyzed as, an aspect of the adequacy of the State's procedural safeguards, yet the Court claims Burch did not present this issue and purports not to decide it. See *ante*, at 117, and n. 3, 135–136; but see *infra*, at 150–151. By suggesting that petitioners' acts are attributable to the State, cf. *ante*, at 135–136, the Court either abandons its position that "Burch does not claim that he was deprived of due process by an established state procedure," *ante*, at 117, n. 3, or abandons *Parratt* and *Hudson*'s distinction between established procedures and unauthorized departures from those practices. Petitioners were not charged with formulating policy, and the complaint does not allege widespread and common departure from required procedures. Neither do the Court's passing reflections that a hearing is constitutionally required in the usual case of treatment of an incompetent patient advance the argument. *Ante*, at 117, 135. That claim either states the conclusion that the State's combined admission procedures are generally inadequate, or repudiates *Parratt*'s and *Hudson*'s focus upon random and unauthorized acts and upon the State's ability to formulate safeguards. To the extent that a liberty interest exists in the application of the involuntary admission procedures whenever appropriate, it is the random and unauthorized action of state actors that effected the deprivation, one for which Florida also provides adequate postdeprivation process. See Fla. Stat. § 768.28(1) (1981) (partial waiver of immunity, allowing tort suits); § 394.459(13) (providing action against "[a]ny person who violates or abuses any rights or privileges of patients" provided by the Florida Mental Health Act).

The Court's delegation of authority argument, like its claim that "we cannot say that predeprivation process was impossible here," *ante*, at 136, revives an argument explicitly rejected in *Hudson*. In *Hudson*, the Court rebuffed the argument that "because an agent of the state who intends to deprive a person of his property *can* provide predeprivation process, then as a matter of due process he must do so." 468 U. S., at 534 (internal quotation omitted). By failing to consider whether "the *state* cannot possibly know in advance" of the wrongful contravention and by abandoning "[t]he controlling inquiry . . . whether the state is in a position to provide for predeprivation process," the Court embraces the "fundamental misunderstanding of *Parratt*." *Ibid.* Each of the Court's distinctions abandons an essential element of the *Parratt* and *Hudson* doctrines, and together they disavow those cases' central insights and holdings.

The Court's reliance upon the State's inappropriate delegation of duty also creates enormous line-drawing problems. Today's decision applies to deprivations occasioned by state actors given "little guidance" and "broadly delegated, uncircumscribed power" to initiate required procedures. *Ante*, at 135, 136. At some undefined point, the breadth of the delegation of power requires officials to channel the exercise of that power or become liable for its misapplications. When guidance is provided and the power to effect the deprivation circumscribed, no liability arises. And routine exercise of the power must be sufficiently fraught with the danger of "erroneous deprivation." *Ante*, at 136. In the absence of this broadly delegated power that carries with it pervasive risk of wrongful deprivation, *Parratt* and *Hudson* still govern. In essence, the Court's rationale applies when state officials are loosely charged with fashioning effective procedures or ensuring that required procedures are not routinely evaded. In a roundabout way, this rationale states the unexceptional conclusion that liability exists when officials' actions amount to the established state practice, a rationale unasserted in this case and, otherwise, appropriately analyzed under the *Mathews* test.

The Court's decision also undermines two of this Court's established and delicately related doctrines, one articulated in *Mathews* v. *Eldridge*, 424 U. S. 319 (1976), and the other articulated in *Parratt*. As the Court acknowledges, the procedural component of the Due Process Clause requires the State to formulate procedural safeguards and adequate postdeprivation process sufficient to satisfy the dictates of fundamental fairness and the Due Process Clause. *Ante*, at 127. Until today, the reasoning embodied in *Mathews* largely determined that standard and the measures a State must establish to prevent a deprivation of a protected interest from amounting to a constitutional violation. *Mathews* employed the now familiar three-part test (considering the nature of the private interest, efficacy of additional procedures, and governmental interests) to determine what predeprivation procedural safeguards were required of the State. 424 U. S., at 335. That test reflects a carefully crafted accommodation of conflicting interests, weighed and evaluated in light of what fundamental fairness requires. *Parratt* drew upon concerns similar to those embodied in the *Mathews* test. For deprivations occasioned by wrongful departures from unchallenged and established state practices, *Parratt* concluded that adequate postdeprivation process meets the requirements of the Due Process Clause because additional predeprivation procedural safeguards would be "impracticable" to forestall these deprivations. 451 U. S., at 541. The *Mathews* and *Parratt* doctrines work in tandem. State officials able to formulate safeguards must discharge the duty to establish sufficient predeprivation procedures, as well as adequate postdeprivation remedies to provide process in the event of wrongful departures from established state practice. The doctrines together define the procedural measures that fundamental fairness and the Constitution demand of the State.

The Court today discovers an additional realm of required procedural safeguards. Now, all procedure is divided into three parts. In place of the border clearly dividing the duties required by *Mathews* from those required by *Parratt*, the Court marks out a vast terra incognita of unknowable duties and expansive liability of constitutional dimension. The *Mathews* test, we are told, does not determine the State's obligation to provide predeprivation procedural safeguards. Rather, to avoid the constitutional violation a State must have fully circumscribed and guided officials' exercise of power and provided additional safeguards, without regard to their efficacy or the nature of the governmental interests. Even if the validity of the State's procedures is not directly challenged, the burden is apparently on certain state actors to demonstrate that the State sufficiently constrained their powers. Despite the many cases of this Court applying and affirming *Mathews*, it is unclear what now remains of the test. And the *Parratt* doctrine no longer reflects a general interpretation of the Due Process Clause or the complement of the principles contained in *Mathews*. It is, instead, displaced when the State delegates certain types of duties in certain inappropriate ways. This resulting "no man's land" has no apparent boundaries. We are provided almost no guidance regarding what the Due Process Clause requires, how that requirement is to be deduced, or why fundamental fairness imposes upon the States the obligation to provide additional safeguards of nearly any conceivable value. We are left only with the implication that where doubt exists, liability of constitutional dimension will be found. Without so much as suggesting that our prior cases have warned against such a result, the Court has gone some measure to "'make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States.'" *Parratt*, 451 U. S., at 544 (quoting *Paul* v. *Davis*, 424 U. S. 693, 701 (1976)).

The Court's departure from the *Mathews* and *Parratt* doctrines is particularly unjustified because it is unnecessary for resolution of this case. While I believe that Burch's complaint and subsequent argument do not properly place before the Court a traditional challenge to Florida's voluntary admission procedures, the Court, without so declaring, has decided otherwise. Yet, rather than acknowledge this course, the Court crafts its doctrinal innovations.

Understandably reluctant to grapple with Burch's framing of his complaint, the Court less understandably avoids that difficulty of pleading by creating the innovation which so disrupts established law. The Court discovers that "Burch's suit is neither an action challenging the facial adequacy of a State's statutory procedures, nor an action based only on state officials' random and unauthorized violation of state laws." *Ante*, at 136. That is, Burch's suit is not one that established law supports, and thus requires today's unwarranted departure.

The Court believes that Florida's statutory scheme contains a particular flaw. *Ante*, at 135–137. That statutory omission involves the determination of competence in the course of the voluntary admission process, and the Court signals that it believes that these suggested additional safeguards would not be greatly burdensome. *Ante*, at 135–138. The Court further believes that Burch's complaint and argument properly raise these issues and that adopting the additional safeguards would provide relevant benefit to one in Burch's position. The traditional *Mathews* test was designed and, until today, has been employed to evaluate and accommodate these concerns. See *Washington* v. *Harper*, *post*, at 228–235 (applying *Mathews* test, rather than approach suggested today, to evaluate the adequacy of a State's procedures governing administration of antipsychotic drugs to prisoners). That test holds Florida to the appropriate standard and, given the Court's beliefs set out above, would perhaps have yielded a result favoring respondent. While this approach, if made explicit, would have required a strained reading of respondent's complaint and arguments, that course would have been far preferable to the strained reading of controlling procedural due process law that the Court today adopts. Ordinarily, a complaint must state a legal cause of action, but here it may be said that the Court has stated a novel cause of action to support a complaint.

I respectfully dissent.

CRANDON ET AL. *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–931. Argued November 6, 1989—Decided February 27, 1990*

When the individual petitioners terminated their employment with petitioner Boeing Company to accept important positions in the Executive Branch of the Federal Government, Boeing made to each, before he became a Government employee, an unconditional lump-sum payment to mitigate the substantial loss each expected to suffer by reason of his change in employment. Subsequently, the United States filed a civil complaint in the District Court, seeking damages from Boeing and the imposition of a constructive trust on the moneys received by the individual petitioners. The complaint alleged that the payments had been made to supplement the individual petitioners' compensation as federal employees, and that they created a conflict of interest situation which induced the breach of the fiduciary duty of undivided loyalty owed by the individual petitioners to the Government, as measured by, *inter alia*, 18 U. S. C. § 209(a), which makes it a crime for a private party to pay, and a Government employee to receive, supplemental compensation for the employee's Government service. The court held, among other things, that § 209(a) had not been violated because the payments were made before the recipients had become Government employees and were not intended to compensate them for Government service. The Court of Appeals reversed, holding, *inter alia*, that employment status at the time of payment is not an element of a § 209(a) violation, and that the finding that the payments were not intended to be supplemental compensation for Government service was clearly erroneous.

Held: Section 209(a) does not apply to a severance payment that is made to encourage the payee to accept Government employment, but is made before the payee becomes a Government employee. Pp. 157–168.

(a) Section 209(a)'s text indicates that employment status is an element of the offense. Neither of its two prohibitions—the one directed to every person who "receives" any salary supplement "as compensation for his services as an officer or employee" and the other directed to every person who "pays," or makes any contribution to the salary of, "any officer or employee"—directly specifies when a payment must be made or

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*Together with No. 88–938, *Boeing Co., Inc.* v. *United States*, also on certiorari to the same court.

received. However, a literal reading of the second prohibition supports the conclusion that the payee must be a Government employee at the time the payment is made, and the prohibitions appear to be coextensive in their coverage of both sides of a single transaction. Pp. 158–160.

(b) The legislative history of § 209(a), the language of §§ 209(b) and (c)—which obviously focus on certain other payments that are made while the recipient is a Government employee—and the unambiguous language covering preemployment payments that Congress used in its contemporaneous revision of other bribery and conflicts provisions indicate that Congress did not intend to change the substance of § 209(a)'s predecessor statute when it eliminated language that had unquestionably required a recipient of a payment to be a Government employee at the time the payment was made. Pp. 160–164.

(c) A literal reading of § 209(a) serves one of the conflicting policies that motivated the enactment of the statute—the public interest in recruiting personnel of the highest quality and capacity—since it allows corporations to encourage qualified employees to make their special skills available to the Government. While the other policy justifications for § 209(a)—concerns that the private paymaster will have an economic hold over the employee, that the payment will engender bitterness among fellow employees, and that the employee might tend to favor his former employer—are not wholly inapplicable to unconditional preemployment severance payments, they by no means are as directly implicated as they are in the cases of ongoing salary supplements. Pp. 164–168.

(d) To the extent that any ambiguity over the temporal scope of § 209(a) remains, the rule of lenity requires that it should be resolved in petitioners' favor unless and until Congress plainly states that its intent has been misconstrued. P. 168.

845 F. 2d 476, reversed.

STEVENS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 168.

Philip A. Lacovara argued the cause for petitioners in No. 88–931. With him on the briefs were *William R. Stein*, *Gerard F. Treanor, Jr.*, *Robert Plotkin*, and *E. Lawrence Barcella*. *Benjamin S. Sharp* argued the cause for petitioner in No. 88–938. With him on the briefs were *Hilary Harp*, *Robert S. Bennett*, and *Alan Kriegel*.

Edwin S. Kneedler argued the cause for the United States. With him on the brief were *Solicitor General Starr, Acting Assistant Attorney General Schiffer, Deputy Solicitor General Wallace, Michael F. Hertz,* and *Douglas Letter.*

JUSTICE STEVENS delivered the opinion of the Court.

In 1981 and 1982, five executives of The Boeing Company, Inc. (Boeing), resigned or took early retirement to accept important positions in the Executive Branch of the Federal Government. Upon termination of employment by Boeing, and shortly before formation of an employment relationship with the Government, Boeing made a lump-sum payment to each in an amount that was intended to mitigate the substantial financial loss each employee expected to suffer by reason of his change in employment. The question we must decide is whether these payments violated a provision of the Criminal Code that prohibits private parties from paying, and Government employees from receiving, supplemental compensation for the employee's Government service.[1]

The essential facts are not disputed. Each employee resigned because he planned to accept a specific federal position. These shifts required forgoing the higher salaries that each employee would have earned at Boeing and also severing all financial connection with the company. Thus, petitioner Paisley, who took early retirement to become Assistant Secretary of the Navy for Research, Engineering and Systems—an office that requires confirmation by the United States Senate—estimated that the financial cost to him of separating from Boeing would be approximately $825,000, including approximately $77,000 in lost stock options and $250,000 in lost retirement benefits.[2] Boeing's severance payment to Paisley amounted to $183,000.[3] The comparable estimate of petitioner Crandon, who resigned to become a computer scientist for the North Atlantic Treaty Organization, was $150,000; his severance payment was $40,000.[4] The other three individual petitioners' payments were higher than Crandon's but lower than Paisley's.[5] Boeing paid the five departing employees a total of $485,000.[6]

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[1] "Salary of Government officials and employees payable only by United States

"(a) Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia, from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality; or

"Whoever, whether an individual, partnership, association, corporation, or other organization pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection—

"Shall be fined not more than $5,000 or imprisoned not more than one year, or both." 18 U. S. C. § 209(a) (enacted as Act of Oct. 23, 1962, Pub. L. 87–849, § 1(a), 76 Stat. 1125).

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[2] Joint Stipulations of Uncontested Facts ¶41, App. 27.

[3] 845 F. 2d 476, 478 (CA4 1988).

[4] Joint Stipulations of Uncontested Facts ¶87, App. 33; 845 F. 2d, at 478.

[5] Petitioner Jones, who resigned to become Deputy Under Secretary of Defense for Strategic and Theater Nuclear Forces, requested $176,000 as the cost of severance and received $132,000. Petitioner Reynolds, who resigned to become a consultant and then Deputy Director of Space and Intelligence Policy, requested $195,000 and received $80,000. Petitioner Kitson, who took early retirement to become Deputy Assistant Secretary of the Navy for Command, Control, Communications and Intelligence, requested $180,000 and received $50,000. Joint Stipulations of Uncontested Facts ¶25, App. 26; *id.*, ¶55, App. 29; *id.*, ¶¶71–72, App. 31; 845 F. 2d, at 478. The employees submitted estimates to Boeing that included their expected reduction in salary and benefits and the value of accumulated, but unvested, company benefits. A separate payment, standard to all departing Boeing employees, cashed out the employees' interests in vested benefits. *Ibid.*

[6] Boeing's internal accounting procedure for calculating severance pay for employees departing for Government positions used four factors: (1) the loss of salary for the duration of anticipated Government employment, which was assumed to be the remainder of the Presidential term, or the period prior to the employee's 65th birthday, whichever was shorter; (2) the loss of Boeing's contributions to the employee's retirement plan; (3) re-

None of the five individual petitioners was a Government employee at the time he received his severance payment.[7] Moreover, each payment was made unconditionally. None of the employees promised to return to Boeing at a later date nor did Boeing make any commitment to rehire them. After entering Government service, none of the individual petitioners provided Boeing with any favored treatment or, indeed, participated in any source selection or procurement decision that affected Boeing. It is stipulated that all five were competent and faithful Government servants. Apart from the fact of the payments themselves, there is no charge in this case of any misconduct by any of the petitioners.

In 1986 the United States filed a civil complaint alleging that the payments had been made "to supplement each individual defendant's compensation as a federal employee" and that they "created a conflict of interest situation which induced the breach of the fiduciary duty of undivided loyalty [which] each individual defendant owed to the United States, as measured by 18 U. S. C. § 209 and/or the common law." App. 12. The complaint sought relief from Boeing in the aggregate amount of the payments made and the imposition of a constructive trust on the moneys received by each of the individual petitioners.

After a full trial, the District Court ruled against the Government on several alternative grounds. 653 F. Supp. 1381 (ED Va. 1987). First, it held that § 209(a) had not been vio-

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location costs; and (4) a supplement to cover the difference between living costs in Seattle and in Washington, D.C. An alternative procedure considered the employee's salary and years of service at Boeing and the duration of anticipated Government employment. App. 281–283.

Boeing staff estimated payments for petitioners Kitson and Crandon using both procedures and for petitioners Jones, Paisley, and Reynolds using solely the first procedure. Each petitioner's anticipated length of Government service was thus a component of the calculation of his final payment. Final amounts were approved by Boeing's chief executive. 845 F. 2d, at 478.

[7] *Ibid.*

lated because the payments were made before the recipients had become Government employees and were not intended to compensate them for Government service. Second, it held that there was no violation of any fiduciary standard of conduct established by common-law principles of agency because the payments were disclosed to responsible Government officials and because they did not "tend to subvert the loyalty of the individual defendants to the United States government." *Id.*, at 1387. Finally, the District Court concluded that the payments "created neither the appearance of nor an actual conflict of interest," and that the Government had not been injured by the payments and was therefore not, in any event, entitled to recover damages. *Ibid.*

A divided panel of the Court of Appeals reversed. 845 F. 2d 476 (CA4 1988). It held that employment status at the time of payment is not an element of a § 209(a) violation and that the District Court's finding that the payments were not intended to be supplemental compensation for services as employees of the United States was clearly erroneous. *Id.*, at 480. It further held that the prophylactic character of the conflict of interest laws made it unnecessary for the Government to prove any actual injury and that the defendants' disclosure of the payments did not constitute a defense to an action for their recovery. It therefore concluded that both the individual defendants and Boeing were liable, "although double recovery by the government is not permitted." *Id.*, at 482.[8]

We granted certiorari to review the Court of Appeals' construction of this important statute. 490 U. S. 1003 (1989).

I

At the outset, we note that Congress has not created an express civil remedy for violations of § 209(a). The Government does not, in so many words, argue that the enactment of the statute implicitly created a damages remedy. Rather, the Government begins with the common-law rule that an agent who secretly profits from a breach of a fiduciary obligation to his principal must disgorge his ill-gotten gains. It then replaces the common-law definition of fiduciary obligation with the stricter standard of § 209(a), arguing that because concealment of a payment is not an element of the statutory offense, disclosure of payments is no defense. Regardless of whether the Government's amalgamation of common-law and statutory concepts describes a tenable theory of recovery, it is at least clear that the Government must prove a violation of § 209(a) to prevail in these cases. We proceed therefore to consider whether § 209(a) applies to a severance payment that is made to encourage the payee to accept Government employment, but that is made before the payee becomes a Government employee.

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[8] The Court of Appeals also held that the statute of limitations barred all of the Government's tort claims against Boeing, except Boeing's payment to Kitson. *Id.*, at 481–482.

In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy. *K mart Corp.* v. *Cartier, Inc.*, 486 U. S. 281, 291 (1988); *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U. S. 41, 51 (1987). Moreover, because the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of § 209 is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Liparota* v. *United States*, 471 U. S. 419, 427 (1985); see also *United States* v. *Bass*, 404 U. S. 336, 347–348 (1971).

II

Section 209 is one of almost two dozen statutory provisions addressing bribery, graft, and conflicts of interest that were revised and compiled at Chapter 11 of the Criminal Code in

1962. 18 U. S. C. §§ 201–224. While some sections focus on bribes or compensation offered as a *quid pro quo* for Government acts, and apply to persons before and after commencing Government service, § 209 is a prophylactic rule that aims at the source of Government employees' compensation.[9]

Section 209(a) contains two prohibitions, neither of which directly specifies when a payment must be made or received. The first paragraph is directed to every person who "receives" any salary supplement "as compensation for his services as an officer or employee" of an executive agency of the Government. The second paragraph is directed to every person who "pays," or makes any contribution or supplement to the salary of, "any such officer or employee" under circumstances that would make the receipt of the contribution a violation of the subsection. A literal reading of the second paragraph—particularly the use of the term "any such officer or employee"—supports the conclusion that the payee must be a Government employee at the time the payment is made. Similarly, the paragraph's additional prohibitions on one who "makes any contribution to, or in any way supplements the salary of," also refer to "any such officer or employee." Indeed, since the prohibited conduct is merely the receipt or the payment of the salary supplement, it follows that a violation of § 209(a) either is, or is not, committed at the time the payment is made. Despite the awkward drafting of the paragraphs, they appear to be coextensive in their coverage of both sides of a single transaction. The text of § 209(a) thus indicates that employment status is an element of the offense.[10]

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[9] See 18 U. S. C. § 201 ("Bribery of public officials and witnesses"); 18 U. S. C. § 203 ("Compensation to Members of Congress, officers, and others in matters affecting the Government"). Some preemployment payments—and the mere offering or seeking thereof—thus are criminal under the provisions of § 203.

[10] JUSTICE SCALIA's grammatical analysis, *post*, at 169–170, misses the point. It does not matter whether the payment is made *to* "any such offi-

The Court of Appeals rejected this reading of the statute for two reasons. First, it noted that prior to its codification as § 209(a) of the Criminal Code in 1962, the plain language of the predecessor statute at 18 U. S. C. § 1914 (1958 ed.) was unambiguously limited to whoever, "being a Government official or employee," received any salary.[11] The Court of Appeals inferred that the deletion of this phrase meant that the payment no longer need occur during federal employment, and thus preemployment payments could violate § 209(a). 845 F. 2d, at 480. Second, it felt that the public policy underlying "§ 209 and the conflict of interest laws in general also support a broad interpretation of its coverage." *Ibid.* Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text. In this case, each of these sources indicates that our reading of the statutory language is consistent with congressional intent.

III

The predecessor of § 209(a) was enacted in 1917 as an amendment to the Bureau of Education's legislative appropriation and provided that "no Government official or employee shall receive any salary in connection with his services" from a non-Government source.[12] The phrase "*being a*

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cer," or to supplement the salary *of* "any such officer." In either event, the recipient of the payment must be "any such officer."

[11] The first paragraph of § 1914 was:

"Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality . . . ." 18 U. S. C. § 1914 (1958 ed.).

[12] The legislation arose from a desire to halt the Bureau of Education's practice of allowing private organizations, such as the Rockefeller Foundation and universities, to pay the real salaries of employees whom the Bureau would pay the nominal salary of one dollar a year. Decrying the "ac-

Government official or employee" did not appear until 1948, when the provision was transferred from 5 U. S. C. § 66 to 18 U. S. C. § 1914 in the reorganization of Title 18.[13] As the Court of Appeals recognized, this wording of § 1914 unquestionably required a recipient of a payment to be a Government employee at the time the payment was made. This

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tivities that have been indulged in through the Bureau of Education by agencies which seem to me to be inimical to the education of the youth of this country," Senator Chamberlain of Oregon proposed the following addition to the fiscal year 1918 appropriations bill:

"That no part of the appropriations made for the Bureau of Education, whether for salaries or expenses or any other purpose connected therewith, shall be used in connection with any money contributed or tendered by the General Education Board or any corporate or other organization or individual in any way associated with it, either directly or indirectly, or contributed or tendered by any corporation or individual other than such as may be contributed by State, county, or municipal agencies; nor shall the Bureau of Education receive any moneys for salaries . . . ." 54 Cong. Rec. 2039 (1917).

The proviso that passed, although still located in the section addressing the Bureau of Education's appropriations, contained much broader language:

"[N]o Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, except as may be contributed out of the treasury of any State, county, or municipality, and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for the Government of the United States . . . ." Act of Mar. 3, 1917, ch. 163, § 1, 39 Stat. 1106.

See *International R. Co.* v. *Davidson*, 257 U. S. 506, 515 (1922) (reading § 1 of the uncodified statute independently). This language was codified in 1934 at 5 U. S. C. § 66 (1934 ed.). For a legislative history, see Hearings on H. R. 1900 et al. before the Antitrust Subcommittee of the House Committee on the Judiciary, 86th Cong., 2d Sess., 738–740 (1960) (Memorandum for the Attorney General Re: Conflict of Interest Statutes (1956)).

[13] Act of June 25, 1948, ch. 645, § 1, 62 Stat. 793. The Reviser's Note to the official Code explains three specific changes from the wording of 5 U. S. C. § 66, but does not mention this addition. The change appears to be encompassed in the Reviser's conclusion that "[m]inor changes were made in phraseology." 18 U. S. C. § 1914 (1946 ed., Supp. IV).

reading neither changed the original scope of the statute nor engendered any controversy; in the entire period between 1917 and 1962, criticism focused instead on the vagueness of the reference to payments made "in connection with" the employee's service.[14] The fact that the legislative history of § 209(a) explains the narrowing consequence of the elimination of these words, but is silent on the reason for eliminating "being a Government official or employee," is inconsistent with the view that Congress intended the latter change to broaden the coverage of the section.[15] The Senate and House Judiciary Committees and the Attorney General all maintained that § 209(a) made no substantive change in the law. Rather, the deletion of "Government official or employee" and use of the phrase "officer or employee of the executive branch" seemed only to enhance clarity and consistency with the other new conflicts statutes.[16]

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[14] See, *e. g.*, H. R. Rep. No. 748, 87th Cong., 1st Sess., 13 (1961); Association of the Bar of the City of New York, Conflict of Interest and Federal Service 212–216 (1960).

[15] See S. Rep. No. 2213, 87th Cong., 2d Sess., 14 (1962); H. R. Rep. No. 748, *supra*, at 24–25. Attorney General Kennedy's summary Memorandum Regarding Conflict of Interest Provisions of Public Law 87–849, 28 Fed. Reg. 988 (1963), reported that subsection (a) "uses much of the language of the former 18 U. S. C. 1914 and does not vary from that statute in substance."

Deletion of the phrase "being a Government official or employee" had been suggested at least once before in a proposed amendment that the House Antitrust Subcommittee considered in 1958, but that did not pass. The Subcommittee staff had found the phrase did not clearly cover Members of Congress or the Judiciary, and had recommended that the section be revised to address "[w]hoever receives any salary, or any contribution to or supplementation of salary, for or in connection with his services as a Member of or Delegate to Congress or a Resident Commissioner, or an officer, agent, or employee of the United States in the executive, legislative, or judicial branch . . . ." House Committee on the Judiciary, Federal Conflict of Interest Legislation, 85th Cong., 2d Sess., 45, 61, 82 (Comm. Print 1958). Like § 209(a), this proposed amendment dropped the "being a Government official" clause and left the unqualified "[w]hoever receives" subject, yet its drafters did not contemplate any effect on persons not yet employed by the Government.

We attach greater significance to two other changes that Congress made when it revised the bribery and conflict laws in 1962. In § 201 it added language extending the prohibition against bribery of a public official to a "person who has been selected to be a public official," which it defined as "any person who has been nominated or appointed to be a public official, or has been officially informed he will be so nominated or appointed."[17] In § 203, which prohibits outside compensation for the performance of public service, Congress expressly covered advance requests or offers of compensation for services to be "rendered . . . at a time when [the recipient] is an officer or employee of the United States."[18] In both of these provisions Congress used unambiguous language to cover preemployment payments; the absence of comparable language in § 209(a) indicates that Congress did not intend to broaden the pre-existing coverage of that provision.

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[16] One purpose of the 1962 bill was to eliminate inconsistency and overlap in the conflicts provisions. Section 1914 was the only predecessor statute containing the phrase "Government official or employee." In the new §§ 207, 208, and 209, the 1962 bill replaced this phrase and the different terms previously used in §§ 281, 283, 284, and 434 with the uniform phrase "officer or employee of the executive branch of the United States Government, of any independent agency of the United States, or of the District of Columbia." H. R. Rep. No. 748, *supra*, at 41–45.

[17] Act of Oct. 23, 1962, Pub. L. 87–849, 1(a), 76 Stat. 1119. The phrase was "included in order to set forth the point at which a prospective public official comes within the statutory coverage." H. R. Rep. No. 748, *supra*, at 18.

[18] 76 Stat. 1121. The present statute is even more specific, covering services "rendered or to be rendered either personally or by another—(A) at a time when such person is a Member of Congress, Member of Congress Elect, Delegate, Delegate Elect, Resident Commissioner, or Resident Commissioner Elect; or (B) at a time when such person is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia." 18 U. S. C. § 203(a)(1).

Further evidence confirming that § 209(a) requires employment status at the time of payment is found in subsections (b) and (c) of § 209.[19] The former expressly authorizes federal employees to continue to receive payments from a bona fide pension, health, or other benefit plan maintained by a former employer, and the latter makes § 209 inapplicable to certain types of Government employees. Both of the provisions obviously focus on payments that are made while the recipient is a Government employee. The addition of these two exemptions in 1962, like the careful draftsmanship of §§ 201 and 203, is consistent with Attorney General Kennedy's contemporaneous opinion that § 209(a) did not change the substance of the former 18 U. S. C. § 1914. See n. 14, *supra.*

IV

Congress appropriately enacts prophylactic rules that are intended to prevent even the appearance of wrongdoing and that may apply to conduct that has caused no actual injury to the United States. Section 209(a) is such a rule. Legislation designed to prohibit and to avoid potential conflicts of interest in the performance of governmental service is supported by the legitimate interest in maintaining the public's confidence in the integrity of the federal service.[20] Neither good faith, nor full disclosure, nor exemplary performance of public office will excuse the making or receipt of a prohibited payment. It is nevertheless appropriate, in a case that raises questions about the scope of the prohibition, to identify the specific policies that the provision serves as well as those that counsel against reading it too broadly. See *Offshore Logistics, Inc.* v. *Tallentire,* 477 U. S. 207 (1986).

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[19] Those subsections provide:

"(b) Nothing herein prevents an officer or employee of the executive branch of the United States Government, or of any independent agency of the United States, or of the District of Columbia, from continuing to participate in a bona fide pension, retirement, group life, health or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plan maintained by a former employer.

"(c) This section does not apply to a special Government employee or to an officer or employee of the Government serving without compensation, whether or not he is a special Government employee, or to any person paying, contributing to, or supplementing his salary as such." 18 U. S. C. §§ 209(b), (c).

A special committee on the federal conflict of interest laws of the Association of the Bar of the City of New York prepared a scholarly report in 1960 that the Government and the petitioners agree accurately describes the policies implemented by § 209(a). The report stated:

> "The rule is really a special case of the general injunction against serving two masters. Three basic concerns underlie this rule prohibiting two payrolls and two paymasters for the same employee on the same job. First, the outside payor has a hold on the employee deriving from his ability to cut off one of the employee's economic lifelines. Second, the employee may tend to favor his outside payor even though no direct pressure is put on him to do so. And, third, because of these real risks, the arrangement has a generally unwholesome appearance that breeds suspicion and bitterness among fellow employees and other observers. The public interpretation is apt to be that if an outside party is paying a government employee and is not paying him for past services, he must be paying him for some current services to the payor during a time when his services are supposed to be devoted to the government." Association of the

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[20] Conflict of interest legislation is "directed at an evil which endangers the very fabric of a democratic society, for a democracy is effective only if the people have faith in those who govern, and that faith is bound to be shattered when high officials and their appointees engage in activities which arouse suspicions of malfeasance and corruption." *United States* v. *Mississippi Valley Generating Co.,* 364 U. S. 520, 562 (1961).

> Bar of the City of New York, Conflict of Interest and Federal Service 211 (1960).

It is noteworthy that this report characterized the relevant rule as one "prohibiting two payrolls and two paymasters for the same employee on the same job." At least two of the three policy justifications for the rule—the concern that the private paymaster will have an economic hold over the employee and the concern about bitterness among fellow employees—apply to ongoing payments but have little or no application to an unconditional preemployment severance payment. Of course, the concern that the employee might tend to favor his former employer would be enhanced by a generous payment, but the absence of any ongoing relationship may mitigate that concern, particularly if other rules disqualify the employee from participating in any matter involving a former employer. Thus, although the policy justifications for § 209(a) are not wholly inapplicable to unconditional preemployment severance payments, they by no means are as directly implicated as they are in the cases of ongoing salary supplements.

An important countervailing consideration also cannot be ignored. As President Kennedy recognized in 1961 when he sent his message to Congress calling for a wholesale revision of the conflict of interest laws:

> "Such regulation, while setting the highest moral standards, must not impair the ability of the Government to recruit personnel of the highest quality and capacity. Today's Government needs men and women with a broad range of experience, knowledge, and ability. It needs increasing numbers of people with topflight executive talent. It needs hundreds of occasional and intermittent consultants and part-time experts to help deal with problems of increasing complexity and technical difficulty. In short, we need to draw upon America's entire reservoir of talent and skill to help con-

> duct our generation's most important business—the public business." Message from the President of the United States Relative to Ethical Conduct in the Government, H. R. Doc. No. 145, 87th Cong., 1st Sess., 2 (1961).

The President described some of the statutes that were then on the books as wholly inadequate, while others "create[d] wholly unnecessary obstacles to recruiting qualified people for Government service." *Id.*, at 3.

Attorney General Kennedy commented on this same concern in his memorandum on the 1962 legislation. After explaining that one of the "main purposes of the new legislation" was "to help the Government obtain the temporary or intermittent services of persons with special knowledge and skills whose principal employment is outside the Government," he predicted that the new legislation would "lead to a significant expansion of the pool of talent on which the departments and agencies can draw for their special needs."[21] The substantive additions of §§ 209(b) and 209(c) to allow continuing participation in pension and benefits plans and to exempt certain employees from the prohibitions of § 209(a) is wholly consistent with the Attorney General's outlook. In contrast, an expansion of § 209(a) to encompass preemployment payments would run counter to this interest.[22]

The severance payments made to the petitioners in this case have a somewhat nebulous character. On the one hand, as the Government correctly argues, they give rise to a possible appearance of impropriety that is certainly one of the concerns of § 209(a). On the other hand, allowing corporations to encourage qualified employees to make their special skills available to the Government serves the public interest identified by both the President and the Attorney General when § 209(a) was enacted. It is not our function to express either approval or disapproval of this kind of unconditional severance payment. We note only that a literal reading of the statute—which places a pre-Government service severance payment outside of the coverage of § 209(a)—is consistent with one of the policies that motivated the enactment of the statute. Because the language Congress used in § 209(a) is thus in "harmony with what is thought to be the spirit and purpose of the act," this case presents none of the "rare and exceptional circumstances" that may justify a departure from statutory language. *Crooks* v. *Harrelson*, 282 U. S. 55, 59–60 (1930); accord, *Rubin* v. *United States*, 449 U. S. 424, 430 (1981).

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[21] Office of the Attorney General, Memorandum Regarding Conflict of Interest Provisions of Public Law 87–849, 28 Fed. Reg. 985 (1963).

[22] The reach of § 1914 had long been recognized as "a serious obstacle to recruitment of men for government office at an age when they are apt to be most vigorous and productive." Association of the Bar of the City of New York, Conflict of Interest and Federal Service 158 (1960). See also Hearings on H. R. 1900 et al., *supra*, n. 12, at 750 (Memorandum for the Attorney General Re: Conflict of Interest Statutes (1956)) ("It appears that the only significant problem respecting section 1914 is whether it discourages recruitment of executives from private industry").

Finally, as we have already observed, we are construing a criminal statute and are therefore bound to consider application of the rule of lenity. To the extent that any ambiguity over the temporal scope of § 209(a) remains, it should be resolved in the petitioners' favor unless and until Congress plainly states that we have misconstrued its intent.

The judgment of the Court of Appeals is accordingly reversed.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, concurring in the judgment.

I agree with the Court that the Government has failed to prove that any of the petitioners violated 18 U. S. C. § 209 (a), and that its claim to a common-law remedy premised upon such a violation accordingly must fail. My reasons, however, are somewhat different. I do not think that payments which are made before or after the term of federal employment are necessarily excluded from § 209(a); but I do think that payments which are neither made periodically during the term of federal service, nor calculated with reference to periodic compensation, are excluded.

I

Subsection (a) of § 209 makes criminally liable:

> "Whoever receives any salary, or any contribution to or supplementation of salary, as compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States[; and]
>
> "Whoever . . . pays, or makes any contribution to, or in any way supplements the salary of, any such officer or employee under circumstances which would make its receipt a violation of this subsection . . . ."

I agree with the Court that these two clauses are "coextensive in their coverage of both sides of a single transaction," *ante*, at 159, so that if the phrase "such officer or employee" in the second clause implies a requirement that the payment be made *while* the recipient was an officer or employee, such a requirement must have been meant in the first clause as well. Surely, however, the evidence of such an implication should be fairly clear before one concludes that Congress has slipped in an additional requirement in such an unusual fashion, importing it retroactively into the earlier clause from a provision that is otherwise only the mirror image of what preceded. To my mind the evidence is not only not fairly clear; it is nonexistent. The Court is led astray, I think, by its perception that the statute "is directed to every person who 'pays' . . . 'any such officer or employee,'" *ibid.*—which leads to the reasonable enough contention that unless the recipient is an officer or employee at the time of payment the provision is not violated. But in order to make "any such officer or employee" the object of the verb "pays," the clause must be rendered ungrammatical, reading "[w]hoever pays . . . any such officer or employee under circumstances which would make its receipt a violation of this subsection." The pronoun "its" has no antecedent (or more precisely, I suppose, the phrase "under circumstances which would make its receipt a violation of this subsection" has no application to "[w]hoever pays"). It seems to me quite clear that the object of "pays" must be, not "any such officer or employee," but rather "*the salary of*, any such officer or employee," so that the later phrase "its receipt" refers to the receipt of the salary. Substance as well as grammar dictates this result, because only in this fashion does the second clause of subsection (a) achieve the apparent purpose of mirroring the first. The first clause does not apply to "whoever receives any payment, or any contribution to or supplementation of salary," but rather to "[w]hoever receives any *salary*, or any contribution to or supplementation of salary." One would therefore expect the second clause to cover whoever *pays* any salary, or any contribution to or supplementation of salary. I acknowledge that this interpretation of the second clause means that the comma after the phrase "the salary of" should instead have been placed after the word "supplements." But a misplaced comma is more plausible than a gross grammatical error, plus the destruction of an apparently intended parallelism, both leading to the peculiar introduction of a condition in the second clause which one would surely have expected to find in the first.

The Court apparently concedes that when the first clause of subsection (a) refers to someone who "receives any salary, or any contribution to or supplementation of salary, as compensation for . . . services as an officer or employee of the executive branch of the United States," it does not imply that the recipient must be an officer or employee at the time of receipt. There is no *more* reason to think that the second clause imports such a requirement when it refers to someone who "pays, or makes any contribution to, or in any way supplements, the salary of any such officer or employee." Perhaps it is not possible to pay an officer when he is not an officer; but it is surely possible to pay, to contribute to, or to supplement *the salary of an officer* (just as it is possible to receive payment, contribution to, or supplementation of such salary) either before or after the service to which the salary pertains has been completed.

For a different reason, unaddressed by the Court, I agree that the payment in the present case is not covered by § 209(a).

II

It is an ancient and sound rule of construction that each word in a statute should, if possible, be given effect. An interpretation that needlessly renders some words superfluous is suspect. In seeking to hold the present petitioners liable, the Government treats § 209(a) as though it read "[w]hoever receives compensation for his services as an officer or employee of the executive branch of the United States Government . . . from any source other than the Government of the United States." But it does not read that way. Another of the ethics statutes, 18 U. S. C. § 203, *does* read that way, covering the receipt or payment of "any compensation" for services as a Government employee relating to a particular matter. Subsection 209(a), however, does not refer to "whoever receives compensation," but to "whoever receives *any salary, or any contribution to or supplementation of salary, as* compensation." The second clause, as we have seen, is likewise entirely tied to *salary.* It would be bad construction to ignore this language (if it can be given reasonable meaning) in the interpretation of any statute; but it is particularly bad construction to ignore it in a criminal statute, where the rule of lenity applies. See *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 284–285 (1978).

Salary is not the same as compensation, but is one species of that genus. It is "[t]he recompense or consideration paid, or stipulated to be paid, to a person *at regular intervals* for services . . . ; fixed compensation *regularly paid*, as by the year, quarter, month, or week." Webster's Second New International Dictionary 2203 (1957) (emphasis added). See also *Benedict* v. *United States*, 176 U. S. 357, 360 (1900) ("The word 'salary' may be defined generally as a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered"). To "receive salary as compensation" is to receive periodic payments as compensation. And in the context of the present statute it must reasonably be thought that to "receive contribution to or supplementation of salary as compensation" is to receive contribution to or supplementation of periodic payments, in the sense that the contribution or supplementation itself must be periodic. To read it differently—to regard any single payment from a nongovernment source as a "contribution to or supplementation of salary"—is to render all the references to salary superfluous, so that the statute might as well have prohibited (like § 203) all "compensation."[1] It is significant that when the Office of Personnel Management sought to embody the substance of § 209(a) in its ethics regulations, in a fashion that would be understood to mean what the Government thinks it means, it revised the references to contribution and supplementation of salary, as follows:

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[1] Under such an interpretation, the one possible effect of the "salary" language would be to allow an unsalaried Government officer or employee to receive a lump-sum payment for his services from a private source. That would result because the lump-sum payment would not be a "salary," nor could it be a "contribution to or supplementation of salary," since no salary exists to be supplemented or contributed to. But even that effect (strangely contrived as it is) is largely if not completely eliminated by subsection (c), which entirely excludes from the section's coverage special Government employees, as defined in 18 U. S. C. § 202, and uncompensated Government officers and employees. The only class that remains as a possible recipient of lump-sum payments so obscurely validated by the otherwise pointless "salary" language consists of Government officers and employees who are not special employees and who are compensated in some manner other than by payment of salary. I am not aware that such a class exists.

> "An employee shall not receive any salary or anything of monetary value from a private source as compensation for his services to the Government (18 U. S. C. 209)." 5 CFR § 735.203(b) (1989).

Under the original version of § 209(a), enacted in 1917, it was even clearer that "contribution to" or "supplementation of" salary envisioned regular, salary-like payments. That read in relevant part as follows:

> "[N]o Government official or employee shall receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States, . . . and no person, association, or corporation shall make any contribution to, or in any way supplement the salary of, any Government official or employee for the services performed by him for Government of the United States." Act of Mar. 3, 1917, 39 Stat. 1106.

Even when Congress amended the provision in 1948, it left the structure substantially the same, making criminally liable:

> "Whoever, being a Government official or employee, receives any salary in connection with his services as such an official or employee from any source other than the Government of the United States, . . . or
>
> "Whoever, whether a person, association, or corporation, makes any contribution to, or in any way supplements the salary of, any Government official or employee for the services performed by him for the Government of the United States . . . ." 62 Stat. 793.

In each of these versions, if one interpreted the phrase "make(s) any contribution to, or in any way supplement(s) the salary of" to include not only periodic payments but also lump-sum payments, then the prohibitions upon payor and payee would not match: the Government official who received a lump-sum payment would be guiltless (since he did not "receive any salary") whereas the payor would be criminally liable. This obviously was not intended. At both ends, *salary* was the object of the prohibition. The Government does not rely upon any change in the meaning of the statute effected by the 1962 revision and recodification, but to the contrary acknowledges—indeed boasts—that its position was "firmly established" under the earlier versions. Nor would it be appropriate to regard the 1962 legislation as congressional approval and ratification of the prior interpretation. That would in any circumstance be a doubtful basis for disregarding the text of a criminal statute, but is particularly unjustified when, as I shall discuss in Part III below, the interpretation in question was not that of the courts or of an agency that had primary responsibility for administering the law, and was full of inconsistencies to boot.

I must acknowledge that subsections (d) and (e) of § 209 exclude from the coverage of subsection (a) some payments that are not periodic payments, so that the interpretation I have described is no more successful than the Government's in giving effect to all the language of the section. But superfluous exceptions (to "make assurance doubly sure") are a more common phenomenon than the insertion of utterly pointless language at the very center of the substantive restriction. Moreover, since (as I shall discuss in Part III below) the Government is not so foolish as to apply literally its interpretation that all lump-sum payments as compensation are covered, subsections (d) and (e) turn out to be largely superfluous under its view of the statute as well. See May 31, 1961, Memorandum of Office of Legal Counsel (OLC) (advising that the proposed subsection (d) would be "a clarification of existing law" rather than "an exemption" from 18 U. S. C. § 1914 (1958 ed.)); 33 Op. Atty. Gen. 273 (1922); 42 Op. Atty. Gen. 111, 125 (1962). In any case, granting that the only reasonable *implication* of subsections (d) and (e) is that subsection (a) applies to payments in addition to periodic payments, it remains true that the only reasonable *meaning* of subsection

(a) itself is that it applies exclusively to periodic payments. Even if one does not think that a meaning trumps an implication, at most we have an ambiguity—and since this is a criminal statute the rule of lenity demands that it be resolved in favor of the more narrow criminal liability.

It may seem strange nowadays that Congress should think of categorically criminalizing only periodic payments (salary or supplementation of salary), rather than all payments, to Government employees. But it would not have seemed strange in 1917, when the substance of subsection (a) was originally enacted. There existed at that time, in apparently more than one Government agency, a regular practice of hiring, at nominal salary, individuals whose real compensation would be paid by private organizations. 54 Cong. Rec. 2039–2047, 4011–4013; B. Manning, Federal Conflict of Interest Law 148–149 (1964). Cf. 31 Op. Atty. Gen. 470 (1919); 2 Comp. Gen. 775 (1923). Apart from the fact that Congress often acts only "one step at a time" to eliminate one abuse that has become the focus of its attention but not all allied abuses, there are good practical reasons why the payment or supplementation of salary would have been singled out. Surely receipt of a regular salary from a private source poses the *greatest* risk of corruption; one commonly characterizes the corrupt official by saying that "he is on someone's payroll." Moreover, the payment or supplementation of salary can be categorically eliminated (as lump-sum payments cannot) without criminalizing a large number of harmless, perfectly innocent, and often desirable, arrangements. For example: It is rare, I think, for well-to-do parents to make periodic, salary-like payments to their child so that he might continue in a low-paying Government job that they are proud of his performing and wish him to continue. I suspect it is not at all rare, however, for such parents to make occasional gifts to the child, or to leave a particularly generous bequest, with precisely that end in mind. Under the interpretation of § 209 adopted by the Government, each such act of generosity, if rendered and accepted with that objective, would seemingly violate the law. That alone, I should think, would be reason enough not to criminalize all "supplementation of salary" in the sense the Government would have us understand the term.

III

I must address at some length what seems to me the strongest argument against interpreting § 209(a) to mean what it says: the fact that it has long been interpreted differently. On analysis, that proves to be a weaker consideration than one might suppose. Indeed, the long and unsatisfactory experience with a countertextual interpretation is one of the prime reasons for adhering to what Congress enacted.

Two points must be made clear at the outset: First, the substantial history of interpretation that exists is not a history of *judicial* interpretation. In the more than 70 years that § 209 and its predecessors have been in existence, this Court has discussed them, in passing, only three times, see *Muschany* v. *United States*, 324 U. S. 49, 67 (1945); *United States* v. *Myers*, 320 U. S. 561, 567 (1944); *International R. Co.* v. *Davidson*, 257 U. S. 506, 515 (1922). Prior to the present litigation, the Courts of Appeals have discussed them only three times, see *United States* v. *Oberhardt*, 887 F. 2d 790, 793–794 (CA7 1989); *United States* v. *Raborn*, 575 F. 2d 688, 691–692 (CA9 1978); *United States* v. *Muntain*, 198 U. S. App. D. C. 22, 27–28, 610 F. 2d 964, 969–970 (1979), and the District Courts only four times, see *United States* v. *Pezzello*, 474 F. Supp. 462, 463 (ND Tex. 1979); *Exchange National Bank of Chicago* v. *Abramson*, 295 F. Supp. 87, 89–91 (Minn. 1969); *United States* v. *Gerdel*, 103 F. Supp. 635, 638–639 (ED Mo. 1952); *United States* v. *Morse*, 292 F. 273, 276–277 (SDNY 1922). Only one of these scarce judicial references, a 1952 District Court opinion, explicitly discusses the issue of salary *versus* lump-sum payment, agreeing with the Government's position here; that discussion, moreover, was by its own admission "gratuitous," since the statute was in no way at issue. See *Gerdel, supra,* at 638. And in only two of these cases—one from a District Court, one from a Court of Appeals, and both relatively recent—was the (unchallenged) assumption that lump-sum payments were covered apparently necessary to the court's holding. See *United States* v. *Oberhardt, supra; United States* v. *Pezzello, supra.* In sum, the Government's position is not supported by a long, or even appreciable, body of judicial interpretation.

Second, the vast body of *administrative* interpretation that exists—innumerable advisory opinions not only of the Attorney General, the OLC, and the Office of Government Ethics, but also of the Comptroller General and the general counsels for various agencies—is not an administrative interpretation that is entitled to deference under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.,* 467 U. S. 837 (1984). The law in question, a criminal statute, is not administered by any agency but by the courts. It is entirely reasonable and understandable that federal officials should make available to their employees legal advice regarding its interpretation; and in a general way all agencies of the Government must interpret it in order to assure that the behavior of their employees is lawful—just as they must interpret innumerable other civil and criminal provisions in order to operate lawfully; but that is not the sort of specific responsibility for administering the law that triggers *Chevron.* The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference.

Besides being unentitled to what might be called ex officio deference under *Chevron,* this expansive administrative interpretation of § 209(a) is not even deserving of any persuasive effect. Any responsible lawyer advising on whether particular conduct violates a criminal statute will obviously err in the direction of inclusion rather than exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely apparent. That tendency is reinforced when the advice-giver is the Justice Department, which knows that if it takes an erroneously narrow view of what it can prosecute the error will likely never be corrected, whereas an erroneously broad view will be corrected by the courts when prosecutions are brought. Thus, to give persuasive effect to the Government's expansive advice-giving interpretation of § 209(a) would turn the normal construction of criminal statutes upside-down, replacing the doctrine of lenity with a doctrine of severity.

The body of administrative interpretation is nonetheless useful in the present case, for one purpose: It demonstrates beyond question the unmanageable problems that arise when § 209(a) is *not* interpreted as it was written, limited to the payment or supplementation of salary. The administrative history of § 209(a) is a record of poignant attempts by the Attorney General and the OLC to derive reasonable results from the rigid and undiscriminating criminal statute they have invented. To follow their logic is to glimpse behind the looking glass.

An example is employee receipt of cash awards from nonprofit organizations for meritorious public service. Unless one believes that the statutory term "as compensation" (or its predecessor term "in connection with") imports the common-law requirement of bargained-for consideration—which no one contends—it is difficult to imagine any lump-sum payments more clearly covered by § 209(a) than cash grants conferred specifically to reward the work of Government officials. But the Justice Department has approved them. The first OLC opinion doing so, rendered on June 26, 1959, exemplifies the benign if unpredictable discretion that has guided the administrative interpretation of this criminal statute. The opinion quotes a 1922 Attorney General's opinion to make the obvious point that the "'object of the provision . . .

was that no Government official or employee shall serve two masters to the prejudice of his unbiased devotion to the interests of the United States.'" June 26, 1959, Memorandum of OLC 4 (quoting 33 Op. Atty. Gen., at 275). It then continues: "When such a conflict has not been present, the statute has been liberally construed not to apply in situations in which, strictly construed, it might have been held to be applicable but in which there appeared to be no violation of the spirit of the statute." June 26, 1959, Memorandum, at 4. It is of course absurd to interpret a *criminal statute* on the basis of one's perception as to whether its "spirit" has been violated; and doubly absurd to interpret a *prophylactic measure* on the basis of whether the evil against which the prophylaxis was directed in fact exists. The OLC opinion also finds that the award in the subject case is "not based upon the 'master-servant' relationship between the payor and the payee which usually attends or may be expected to attend application of the statute," *id.*, at 5—a principle which, as far as I can tell, has no basis in law and which the Government assuredly does not apply to the statute in other contexts. On the basis of such reasoning, and because "[i]n short, a conflict of interest such as the legislative history of the statute indicates that it was designed to prevent would not be created," *ibid.*, the opinion approves receipt of the Rockefeller Public Service Awards, established under a grant from John D. Rockefeller III.[2]

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[2] The OLC opinion notes, but apparently misses the delicious irony in, the fact that the sponsor of the original version of § 209(a) "objected particularly to the employment of persons whose actual salary was paid by the Rockefeller and Carnegie Foundations." June 26, 1959, Memorandum of OLC 3.

It is interesting to note that three years before this OLC opinion the Comptroller General had given the advice that receipt of the Rockefeller Public Service Awards *would* violate § 1914. 36 Comp. Gen. 155 (1956). At that time the grants were not lump-sum cash gifts, but continuing grants for tuition, travel, and living expenses at educational facilities. It

Later OLC opinions and memoranda continue this essentially catch-as-catch-can approach to public-service awards, unified mostly by the extraordinary principle that this criminal statute is violated if and when its purposes seem to be offended. "[A]n award of this kind is so far removed from the purposes of the statutory prohibition as not to be covered by it." July 31, 1974, Memorandum of OLC 1.

> "[Title] 18 U. S. C. § 209(a) prohibits only those payments made or received with the intent that they reward past government services or compensate for future ones. . . . Intent is to be inferred from the circumstances, particularly the past and prospective connection between the employee and the payor and the ability of the employee to benefit the payor in the performance of his official duties.
>
> "This office has advised that [the Rockefeller Public Service Awards] were not prohibited by the statute because they were not intended to and did not in fact give rise to the sort of dual loyalty which it was designed to prevent. The same would appear to be true here. [The payor] is a non-profit educational institution. The . . . Prize is a one-time-only payment, based on your achievements before you entered the government. While no one factor is determinative, it is our opinion, based on our understanding of the situation, that your receipt of the award is not prohibited by 18 U. S. C. § 209(a)." April 7, 1977, Memorandum of OLC 2–3.

There would certainly be no objection to this "we'll-look-at-all-the-circumstances-and-see-if-it-looks-dangerous" approach if it were applied in the exercise of the President's discretion-laden power to "prescribe regulations for the conduct of employees in the executive branch," 5 U. S. C. § 7301. But it is an unprecedented way of interpreting the criminal law.

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is hard to see why, on the Government's theory, that should have made any difference.

There are many other areas besides "meritorious public-service awards" in which the unworkability of the Government's interpretation has led to what can charitably be called convoluted reasoning. I will mention only two. In 1922 the Attorney General opined that it would not violate the predecessor of § 209(a) for an employee of the Department of Commerce, dispatched on official business for a speech before a business organization, to accept from that organization reimbursement of the travel expenses and hotel bills that he would otherwise have to bear personally. The extent of the reasoning was as follows:

> "Where, as in the arrangement proposed to you, the officer or employee concerned does not personally benefit by the payments from outside sources, any more than he would if he paid his own traveling expenses, the statute is not violated. Literally there may be said to be a 'contribution to' the officer or employee for services performed by him for the Government, but in reality the contribution is to the Government itself, and is in furtherance, not prejudice, of its interests." 33 Op. Atty. Gen., at 275.

Of course the same could have been said of the private payment of the salaries of federal employees that was prevalent in 1917, see *supra*, at 175, so long as the amounts were no more than necessary to induce the employees to continue in their federal jobs, and (in combination with their federal salary) no more than they could have earned elsewhere.

Finally, I may mention the 1940 opinion from Attorney General Robert Jackson to President Roosevelt, advising that the predecessor of § 209(a) did not prohibit universities from granting leave with pay to faculty members serving as consultants to the Government—not as part of a regular sabbatical program, but only to enable the rendering of consulting services to the United States during the wartime emergency. That opinion is genuinely devoid of analysis, unless one gives that name to the *ipse dixit* that "[t]he payments in such circumstances are made with respect to the former employment and incidental to the leave granted; they are not made 'in connection with' the services of the individual as an official or employee of the United States within the contemplation of the statute." 39 Op. Atty. Gen. 501, 503. I mention that opinion because it demonstrates that the "spirit-of-the-matter" approach to § 209(a), necessitated by the interpretation that expands it beyond its language, ultimately (and quite predictably) will affect even the *proper* applications of the statute. The consultants with salaries paid by universities in 1940 were almost the precise equivalent of the employees with salaries paid by foundations in 1917.[3]

As the last example shows, the liberties that the Government has taken with its interpretation of § 209(a), to the extent they appeal to anything more concrete than the "spirit" of the statute, rely upon the phrase "as compensation for" (or its predecessor, "in connection with"). The proper interpretation of § 209(a) will not eliminate that troublesome phrase, but it will eliminate most of the temptation to give it something other than a clear and constant meaning. If § 209(a) covers only the payment of salary, there would be little difficulty in following the principle that the statute is violated when the reason for paying the salary is, in whole or in part, the recipient's status as, or work that the recipient has performed or will perform as, a federal officer or employee. But one balks at applying such a clear principle to, for example, the reimbursement of transportation and lodging for a federal employee who gives a speech, see 33 Op. Atty. Gen. 273 (1922), meritorious public-service awards, see Memorandum of June 26, 1959, reduced-price registration fees for federal employees at American Bar Association meetings, reduced-price entertainment tickets for members of the armed services, or many other situations one can envision. Until a criminal statute reasonable enough to be accorded a clear interpretation can be enacted, lump-sum payments that do not consist of bribes (which are already covered by 18 U. S. C. § 201) or of compensation for services *in a particular matter* (which are already covered by 18 U. S. C. § 203) are better handled by administrative prohibition, through Executive Order under the President's authority and pursuant to 5 U. S. C. § 7301, see Exec. Order No. 11222, 3 CFR 306 (1964–1965 Comp.), and by agency regulations adopted under delegation of that authority. Operating in that manner, the Executive can make, and can experiment with, all sorts of reasonable distinctions that § 209(a), if interpreted to cover lump-sum payments, cannot honestly be said to permit—according special treatment, for example, to privately paid compensation that consists of cash reimbursement for travel and subsistence expenses, see 3 CFR § 100.735–15(d)(1) (1989), and to compensation that consists of awards, but only if conferred by a nonprofit organization, see 3 CFR § 100.735–15(d)(3) (1989); 5 CFR § 735.203(e)(3) (1989).

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[3] While I have limited my discussion in text to Justice Department opinions, those of the Comptroller General are no more rational. Consider, for example, the following:

"Donations of cash to employees by private sources are, therefore, prohibited, even though the money is to be used to purchase transportation tickets or hotel accommodations. However, where the services are furnished in kind, we believe a different conclusion is justifiable." 36 Comp. Gen. 268, 270 (1956).

IV

I come, finally, to applying § 209(a) as I think it must be interpreted to the facts of the present case: The payments to all the recipients here were in lump sums. Perhaps there is room for argument that they would nonetheless fall within the statute if their existence and their amounts were strictly tied to a period of federal service—that is, if they had been computed on the basis of so much per month or so much per year that each recipient promised to serve. But even this argument is eliminated by the District Court's finding that "[t]he severance payments . . . were not contingent upon the individuals *[sic]* entering into federal government service, [or] their remaining in government service for any stated period of time . . . ." 653 F. Supp. 1381, 1384 (ED Va. 1987). There is, in short, no basis for holding that what transpired here was the receipt of "salary, or any contribution to or supplementation of salary" within the meaning of § 209(a). I therefore agree with the Court that the judgment of the Court of Appeals must be reversed.

CARDEN ET AL. v. ARKOMA ASSOCIATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-1476. Argued November 7, 1989—Decided February 27, 1990

Respondent Arkoma Associates, a limited partnership organized under Arizona law, sued petitioners Carden and Limes on a contract dispute in the District Court, relying on diversity of citizenship for federal jurisdiction. Carden and Limes, Louisiana citizens, moved to dismiss on the ground that one of Arkoma's limited partners was also a Louisiana citizen. The court denied the motion, finding the requisite "complete diversity." After petitioner Magee Drilling Co. intervened and counterclaimed against Arkoma, the court awarded judgment to Arkoma. The Court of Appeals affirmed, finding, with respect to the jurisdictional challenge, that complete diversity existed because Arkoma's citizenship should be determined by reference to the citizenship of its general, but not its limited, partners.

Held:

1. Complete diversity is lacking with respect to Carden and Limes. Pp. 187-197.

(a) A limited partnership is not in its own right a "citizen" of the State that created it within the meaning of the federal diversity statute. This Court has firmly resisted extending the well-established rule treating corporations as "citizens" to other artificial entities. *Chapman* v. *Barney*, 129 U. S. 677, 682; *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 456, 457; *Steelworkers* v. *R. H. Bouligny Inc.*, 382 U. S. 145, 151. *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476; *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458, distinguished. Pp. 187-192.

(b) A federal court must look to the citizenship of a partnership's limited, as well as its general, partners to determine whether there is complete diversity. That only the general partners have exclusive and complete control over the partnership's operations and the litigation is irrelevant. This Court's decisions have never held that an artificial entity can invoke diversity jurisdiction based on the citizenship of some but not all of its members. *Bank of United States* v. *Deveaux*, 5 Cranch 61, 90-91; *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 328-329; *Navarro*, *supra*, distinguished. Pp. 192-196.

(c) Whether, and which, artificial entities other than corporations are entitled to be considered "citizens" for diversity purposes are complex questions best left to Congress to decide. Pp. 196-197.

2. The question whether complete diversity exists between Magee and Arkoma was not considered by the Court of Appeals, and this Court will not decide it in the first instance. P. 197.

874 F. 2d 226, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 198.

Richard K. Ingolia argued the cause for petitioners. With him on the briefs was *Kenneth J. Berke*.

Mitchell J. Hoffman argued the cause for respondent. With him on the brief was *Max J. Cohen*.

JUSTICE SCALIA delivered the opinion of the Court.

The question presented in this case is whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties.

I

Respondent Arkoma Associates (Arkoma), a limited partnership organized under the laws of Arizona, brought suit on a contract dispute in the United States District Court for the Eastern District of Louisiana, relying upon diversity of citizenship for federal jurisdiction. The defendants, C. Tom Carden and Leonard L. Limes, citizens of Louisiana, moved to dismiss, contending that one of Arkoma's limited partners was also a citizen of Louisiana. The District Court denied the motion but certified the question for interlocutory appeal, which the Fifth Circuit declined. Thereafter Magee Drilling Company intervened in the suit and, together with the original defendants, counterclaimed against Arkoma under Texas law. Following a bench trial, the District Court awarded Arkoma a money judgment plus interest and attorney's fees; it dismissed Carden and Limes' counterclaim as well as Magee's intervention and counterclaim. Carden, Limes, and Magee (petitioners here) appealed, and the Fifth Circuit affirmed. 874 F. 2d 226 (1988). With respect to petitioners' jurisdictional challenge, the Court of Appeals found complete diversity, reasoning that Arkoma's citizenship should be determined by reference to the citizenship of the general, but not the limited, partners. We granted certiorari. 490 U. S. 1045 (1989).

II

Article III of the Constitution provides, in pertinent part, that "[t]he judicial Power shall extend to . . . Controversies . . . between Citizens of different States." Congress first authorized the federal courts to exercise diversity jurisdiction in the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. In its current form, the diversity statute provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds . . . $50,000 . . . , and is between . . . citizens of different States . . . ." 28 U. S. C. § 1332(a). Since its enactment, we have interpreted the diversity statute to require "complete diversity" of citizenship. See *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806). The District Court erred in finding complete diversity in this case unless (1) a limited partnership may be considered in its own right a "citizen" of the State that created it, or (2) a federal court must look to the citizenship of only its general, but not its limited, partners to determine whether there is complete diversity of citizenship. We consider these questions in turn.

A

We have often had to consider the status of artificial entities created by state law insofar as that bears upon the existence of federal diversity jurisdiction. The precise question posed under the terms of the diversity statute is whether such an entity may be considered a "citizen" of the State under whose laws it was created.[1] A corporation is the paradigmatic artificial "person," and the Court has considered its proper characterization under the diversity statute on more than one occasion—not always reaching the same conclusion. Initially, we held that a corporation "is certainly not a citizen," so that to determine the existence of diversity jurisdiction the Court must "look to the character of the individuals who compose [it]." *Bank of United States* v. *Deveaux*, 5 Cranch 61, 86, 91–92 (1809). We overruled *Deveaux* 35 years later in *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497, 558 (1844), which held that a corporation is "capable of being treated as a citizen of [the State which created it], as much as a natural person." Ten years later, we reaffirmed the result of *Letson*, though on the somewhat different theory that "those who use the corporate name, and exercise the faculties conferred by it," should be presumed conclusively to be citizens of the corporation's State of incorporation. *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 329 (1854).

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[1] The dissent reaches a conclusion different from ours primarily because it poses, and then answers, an entirely different question. It "do[es] not consider" "whether the limited partnership is a 'citizen,'" but simply "assum[es] it is a citizen," because even if we hold that it is, "we are still

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required to consider which, if any, of the *other citizens before the Court* as members of Arkoma Associates are real parties to the controversy." *Post*, at 198 (emphasis added). Furthermore, "[t]he only potentially nondiverse *party* in this case is a limited partner" because "[a]ll *other parties*, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse." *Ibid.* (emphasis added).

That is the central fallacy from which, for the most part, the rest of the dissent's reasoning logically follows. The question presented today is not which of various parties before the Court should be considered for purposes of determining whether there is complete diversity of citizenship, a question that will generally be answered by application of the "real party to the controversy" test. There are *not*, as the dissent assumes, multiple respondents before the Court, but only *one:* the artificial entity called Arkoma Associates, a limited partnership. And what we must decide is the quite different question of how the citizenship of that single artificial entity is to be determined—which in turn raises the question whether it can (like a corporation) assert its own citizenship, or rather is deemed to possess the citizenship of its members, and, if so, which members. The dissent fails to cite a single case in which the citizenship of an artificial entity, the issue before us today, has been decided by application of the "real party to the controversy" test that it describes. See *infra*, at 192–195.

While the rule regarding the treatment of corporations as "citizens" has become firmly established, we have (with an exception to be discussed presently) just as firmly resisted extending that treatment to other entities. For example, in *Chapman* v. *Barney*, 129 U. S. 677 (1889), a case involving an unincorporated "joint stock company," we raised the question of jurisdiction on our own motion, and found it to be lacking:

> "On looking into the record we find no satisfactory showing as to the citizenship of the plaintiff. The allegation of the amended petition is, that the United States Express Company is a joint stock company organized under a law of the State of New York, and is a citizen of that State. But the express company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation. The allegation that the company was *organized* under the laws of New York is not an allegation that it is a corporation. In fact the allegation is, that the company is *not* a corporation, but a joint stock company—that is, a mere partnership." *Id.*, at 682.

Similarly, in *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449 (1900), we held that a "limited partnership association"—although possessing "some of the characteristics of a corporation" and deemed a "citizen" by the law creating it—may not be deemed a "citizen" under the jurisdictional rule established for corporations. *Id.*, at 456. "That rule must not be extended." *Id.*, at 457. As recently as 1965, our unanimous opinion in *Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U. S. 145, reiterated that "the doctrinal wall of *Chapman* v. *Barney*," *id.*, at 151, would not be breached.

The one exception to the admirable consistency of our jurisprudence on this matter is *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476 (1933), which held that the entity known as a *sociedad en comandita*, created under the civil law of Puerto

Rico, could be treated as a citizen of Puerto Rico for purposes of determining federal-court jurisdiction. The *sociedad*'s juridical personality, we said, "is so complete in contemplation of the law of Puerto Rico that we see no adequate reason for holding that the *sociedad* has a different status for purposes of federal jurisdiction than a corporation organized under that law." *Id.*, at 482. Arkoma fairly argues that this language, and the outcome of the case, "reflec[t] the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship." Brief for Respondent 14. The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in *Bouligny*. There, in reaffirming "the doctrinal wall of *Chapman* v. *Barney*," we explained *Russell* as a case resolving the distinctive problem "of fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." 382 U. S., at 151. There could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships." 288 U. S., at 480.[2]

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[2] The dissent correctly observes that "*Russell* tells us nothing about whether the citizenship of the *sociedad*'s members, unlimited or limited, should be considered for purposes of diversity jurisdiction." *Post*, at 207. Rather, as is evident from our discussing the case here instead of in Part B below, *Russell* (according to respondent) tells us something about whether an artificial entity other than a corporation can be considered a "citizen" in its own right. That "[t]he issue in *Russell* was not diversity, but whether the suit against the *sociedad en comandita* could be removed from the Insular Court to the United States District Court for Puerto Rico," *post*, at 207, does not affect *Russell*'s arguable relevance to that question because

Arkoma claims to have found another exception to our *Chapman* tradition in *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458 (1980). That case, however, did not involve the question whether a party that is an artificial entity other than a corporation can be considered a "citizen" of a State, but the quite separate question whether parties that were undoubted "citizens" (viz., natural persons) were the real parties to the controversy. The plaintiffs in *Navarro* were eight individual trustees of a Massachusetts business trust, suing in their own names. The defendant, Navarro Savings Association, disputed the existence of complete diversity, claiming that the trust beneficiaries rather than the trustees were the real parties to the controversy, and that the citizenship of the former and not the latter should therefore control. In the course of rejecting this claim, we did indeed discuss the characteristics of a Massachusetts business trust—not at all, however, for the purpose of determining whether the trust had attributes making it a "citizen," but only for the purpose of establishing that the respondents were "active trustees whose control over the assets held in their names is real and substantial," thereby bringing them under the rule, "more than 150 years" old, which permits such trustees "to sue in their own right, without regard to the citizenship of the trust beneficiaries." *Id.*, at 465–466. *Navarro*, in short, has nothing to do with the *Chapman* question, except that it makes available to re-

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the operative word in both the diversity statute and the removal statute at issue in *Russell* is "citizens."

The dissent goes on to criticize as "seriously flawed," *post*, at 208, our attempt to distinguish *Russell* in connection with the issue we do address, whether a partnership can be considered a "citizen." We point out, not by way of complaint but to prevent confusion, that the criticism is gratuitous, inasmuch as the dissent itself takes no position on this issue, announcing at the very outset that it "do[es] not consider" the question "whether the limited partnership is a 'citizen.'" *Post*, at 198. In any event, the dissent's evidence bearing on the historical pedigree of partnerships comes to our attention at least 25 years too late. For the reasons stated in the text, *Bouligny* considered and rejected applying *Russell* beyond its facts.

spondent the argument by analogy that, just as business reality is taken into account for purposes of determining whether a trustee is the real party to the controversy, so also it should be taken into account for purposes of determining whether an artificial entity is a citizen. That argument is, to put it mildly, less than compelling.

B

As an alternative ground for finding complete diversity, Arkoma asserts that the Fifth Circuit correctly determined its citizenship solely by reference to the citizenship of its general partners, without regard to the citizenship of its limited partners. Only the general partners, it points out, "manage the assets, control the litigation, and bear the risk of liability for the limited partnership's debts," and, more broadly, "have exclusive and complete management and control of the operations of the partnership." Brief for Respondent 30, 36. This approach of looking to the citizenship of only some of the members of the artificial entity finds even less support in our precedent than looking to the State of organization (for which one could at least point to *Russell*). We have never held that an artificial entity, suing or being sued in its own name, can invoke the diversity jurisdiction of the federal courts based on the citizenship of some but not all of its members. No doubt some members of the joint stock company in *Chapman*, the labor union in *Bouligny*, and the limited partnership association in *Great Southern* exercised greater control over their respective entities than other members. But such considerations have played no part in our decisions.

To support its approach, Arkoma seeks to press *Navarro* into service once again, arguing that just as that case looked to the trustees to determine the citizenship of the business trust, so also here we should look to the general partners, who have the management powers, in determining the citizenship of this partnership. As we have already explained, however, *Navarro* had nothing to do with the citizenship of the "trust," since it was a suit by the trustees in their own names.

The dissent supports Arkoma's argument on this point, though, as we have described, under the rubric of determining which parties supposedly before the Court are the real parties, rather than under the rubric of determining the citizenship of the limited partnership. See n. 1, *supra.* The dissent asserts that "[t]he real party to the controversy approach," *post,* at 201—by which it means an approach that looks to "control over the conduct of the business and the ability to initiate or control the course of litigation," *post,* at 204—"has been implemented by the Court both in its oldest and in its most recent cases examining diversity jurisdiction with respect to business associations." *Post,* at 201. Not a single case the dissent discusses, either old or new, supports that assertion. *Deveaux,* which was in any event overruled by *Letson,* seems to be applying not a "real party to the controversy" test, but rather the principle that for jurisdictional purposes the corporation has no substance, and merely "represents" its shareholders, see 5 Cranch, at 90–91; but even if it can be regarded as applying a "real party to the controversy" test, it deems that test to be met by *all* the shareholders of the corporation, without regard to their "control over the operation of the business." *Marshall,* which as we have discussed rerationalized *Letson*'s holding that a corporation was a "citizen" in its own right, contains language quite clearly adopting a "real party to the controversy" approach, and arguably even adopting a "control" test for that status. ("[T]he court . . . will look behind the corporate or collective name . . . to find the persons who act *as the representatives, curators, or trustees* . . . ." 16 How., at 328–329 (emphasis added). "The presumption arising from the habitat of a corporation in the place of its creation [is] conclusive as to the residence or citizenship *of those who use the corporate name and exercise the faculties conferred by it* . . . ." *Id.,* at 329 (emphasis added).) But as we have also discussed, and as the last quotation shows, that analysis was a complete fiction; the real citizenship of the shareholders (or the controlling shareholders) was not consulted at all.[3] From the fictional *Marshall*, the dissent must leap almost a century and a third to *Navarro* to find a "real party to the controversy" analysis that discusses "control." That case, as we have said, is irrelevant, since it involved not a juridical person but the distinctive common-law institution of trustees.

The dissent finds its position supported, rather than contradicted, by the trilogy of *Chapman*, *Great Southern*, and *Bouligny*—cases that did involve juridical persons but that did not apply "real party to the controversy" analysis, much less a "control" test as the criterion for that status. In those cases, the dissent explains, "the members of each association held equivalent power and control over the association's assets, business, and litigation." *Post*, at 202. It seeks to establish this factual matter, however, not from the text of the opinions (where not the slightest discussion of the point appears) but, for *Chapman*, by citation of scholarly commentary dealing with the general characteristics of joint stock company agreements, with no reference to (because the record does not contain) the particular agreement at issue in the case, *post*, at 202–203; for *Great Southern*, by citation of scholarly commentary dealing with the general characteristics of Pennsylvania limited partnership associations, and citation of Pennsylvania statutes, *post*, at 203; and, for *Bouligny*, by nothing more than the observation that "[t]here was no indication that any of the union members had any greater power over the litigation or the union's business and assets than any other member, and, therefore, as in *Chapman* and *Great Southern,* the Court was not called upon to decide" the issue, *post,* at 204. This will not do. Since diversity of citizenship is a jurisdictional requirement, the Court is always "called upon to decide" it. As the Court said in *Great Southern* itself:

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[3] *Marshall*'s fictional approach appears to have been abandoned. Later cases revert to the formulation of *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497 (1844), that the corporation has its own citizenship. See *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 456 (1900) ("[F]or purposes of jurisdiction . . . a corporation was to be deemed a citizen of the State creating it") (citing *Letson*); *Chapman* v. *Barney*, 129 U. S. 677, 682 (1889) ("[E]xpress company cannot be a *citizen* of New York, within the meaning of the statutes regulating jurisdiction, unless it be a corporation").

> "[T]he failure of parties to urge objections [to diversity of citizenship] cannot relieve this court from the duty of ascertaining from the record whether the Circuit Court could properly take jurisdiction of this suit. . . . 'The rule . . . is inflexible and without exception, which requires this court, of its own motion, to deny its own jurisdiction, and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not affirmatively appear in the record on which, in the exercise of that power, it is called to act.'" 177 U. S., at 453 (quoting *Mansfield, C. & L. M. R. Co.* v. *Swan,* 111 U. S. 379, 382 (1884)).

If, as the dissent contends, these three cases were applying a "real party to the controversy" test governed by "control" over the associations, so that the citizenship of all members would be consulted only if all members had equivalent control, it is inconceivable that the existence of equivalency, *or at least the absence of any reason to suspect nonequivalency,* would not have been mentioned in the opinions. Given what 180 years of cases have said and done, as opposed to what they might have said, it is difficult to understand how the dissent can characterize as "newly formulated" the "rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction." *Post,* at 199.

In sum, we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. We adhere to our oft-repeated rule that diversity jurisdiction in a suit by or against the entity depends on the citizenship of "all the members," *Chapman,* 129

U. S., at 682, "the several persons composing such association," *Great Southern*, 177 U. S., at 456, "each of its members," *Bouligny*, 382 U. S., at 146.

C

The resolutions we have reached above can validly be characterized as technical, precedent-bound, and unresponsive to policy considerations raised by the changing realities of business organization. But, as must be evident from our earlier discussion, that has been the character of our jurisprudence in this field after *Letson*. See Currie, The Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 35 (1968). Arkoma is undoubtedly correct that limited partnerships are functionally similar to "other types of organizations that have access to federal courts," and is perhaps correct that "[c]onsiderations of basic fairness and substance over form require that limited partnerships receive similar treatment." Brief for Respondent 33. Similar arguments were made in *Bouligny*. The District Court there had upheld removal because it could divine "'no common sense reason for treating an unincorporated national labor union differently from a corporation,'" 382 U. S., at 146, and we recognized that that contention had "considerable merit," *id.*, at 150. We concluded, however, that "[w]hether unincorporated labor unions ought to be assimilated to the status of corporations for diversity purposes," *id.*, at 153, is "properly a matter for legislative consideration which cannot adequately or appropriately be dealt with by this Court," *id.*, at 147. In other words, having entered the field of diversity policy with regard to artificial entities once (and forcefully) in *Letson*, we have left further adjustments to be made by Congress.

Congress has not been idle. In 1958 it revised the rule established in *Letson*, providing that a corporation shall be deemed a citizen not only of its State of incorporation but also "of the State where it has its principal place of business." 28 U. S. C. § 1332(c). No provision was made for the treatment of artificial entities other than corporations, although the existence of many new, post-*Letson* forms of commercial enterprises, including at least the sort of joint stock company at issue in *Chapman*, the sort of limited partnership association at issue in *Great Southern*, and the the sort of Massachusetts business trust at issue in *Navarro*, must have been obvious.

Thus, the course we take today does not so much disregard the policy of accommodating our diversity jurisdiction to the changing realities of commercial organization, as it honors the more important policy of leaving that to the people's elected representatives. Such accommodation is not only performed more legitimately by Congress than by courts, but it is performed more intelligently by legislation than by interpretation of the statutory word "citizen." The 50 States have created, and will continue to create, a wide assortment of artificial entities possessing different powers and characteristics, and composed of various classes of members with varying degrees of interest and control. Which of them is entitled to be considered a "citizen" for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning, and questions whose complexity is particularly unwelcome at the threshold stage of determining whether a court has jurisdiction. We have long since decided that, having established special treatment for corporations, we will leave the rest to Congress; we adhere to that decision.

III

Arkoma argues that even if this Court finds complete diversity lacking with respect to Carden and Limes, we should nonetheless affirm the judgment with respect to Magee because complete diversity indisputably exists between Magee and Arkoma. This question was not considered by the Court of Appeals. We decline to decide it in the first instance, and leave it to be resolved by the Court of Appeals on remand.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The only potentially nondiverse party in this case is a limited partner. All other parties, including the general partners and the limited partnership itself, assuming it is a citizen, are diverse. Thus, the Court has before it a single question—whether the citizenship of a limited partner must be counted for purposes of diversity jurisdiction. The Court first addresses whether the limited partnership is a "citizen." I do not consider that issue, because even if we were to hold that a limited partnership is a citizen, we are still required to consider which, if any, of the other citizens before the Court as members of Arkoma Associates are real parties to the controversy, *i. e.*, which parties have control over the subject of and litigation over the controversy. See *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How. 314, 328 (1854). Application of that test leads me to conclude that limited partners are not real parties to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction.

I

The Court asserts that "[w]e have long since decided" to leave to Congress the issue of the proper treatment of unincorporated associations for diversity purposes, because the issue of which business association "is entitled to be considered a 'citizen' for diversity purposes, and which of their members' citizenship is to be consulted, are questions more readily resolved by legislative prescription than by legal reasoning." *Ante*, at 197. That assertion is insupportable in light of *Navarro Savings Assn.* v. *Lee*, 446 U. S. 458 (1980) (determination of which members of unincorporated business trust must be considered for purposes of diversity jurisdiction), and even *Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U. S. 145 (1965) (determination of proper treatment of union for diversity jurisdiction purposes according to settled law; Congress has power to change result), on which the Court relies. *Ante*, at 196. Indeed, the Court in this case does not leave the issue to Congress, but rather decides the issue and then invokes deference to Congress to justify its newly formulated rule that the Court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction. In my view, the Court properly tackles the issue, because "application of statutes to situations not anticipated by the legislature is a pre-eminently judicial function." Currie, Federal Courts and the American Law Institute, 36 U. Chi. L. Rev. 1, 35 (1968); see also *Bank of United States* v. *Deveaux*, 5 Cranch 61, 87 (1809) ("The duties of this [C]ourt, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws").

II

The starting point for any analysis of who must be counted for purposes of diversity jurisdiction is *Strawbridge* v. *Curtiss*, 3 Cranch 267 (1806), in which the Court held that "complete diversity" is required among "citizens" of different States. Complete diversity, however, is not constitutionally mandated. See *State Farm Fire & Casualty Co.* v. *Tashire*, 386 U. S. 523, 530–531 (1967) (statutory interpleader need not satisfy complete diversity requirement as long as there is diversity between two or more claimants); see also American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts § 1301(b)(2), Supporting Memorandum A, pp. 426–436 (1969). For example, in a class action authorized pursuant to Federal Rule of Civil Procedure 23, only the citizenship of the named representatives of the class is considered, without regard to whether the citizenship of other members of the class would destroy complete diversity or to the class members' particular stake in the controversy. See *Snyder* v. *Harris*, 394 U. S. 332, 340 (1969); C. Wright, Law of Federal Courts 484 (4th ed. 1983); see also *Owen Equipment & Erection Co.* v. *Kroger*, 437 U. S. 365, 375, and n. 18 (1978) (citizenship of parties joined under ancillary jurisdiction not taken into account for purposes of determining diversity jurisdiction); Wright, *supra*, at 28 (same).

Since the early 19th century, one of the benchmarks for determining whether a particular party among those involved in the litigation must be counted for purposes of diversity jurisdiction has been whether the party has a "real interest" in the suit or, in other words, is a "real party" to the controversy. See 6 C. Wright & A. Miller, Federal Practice and Procedure § 1556, p. 711 (1971) (well settled "citizenship rule testing diversity in terms of the real party in interest is grounded in notions of federalism"). See generally Note, Diversity Jurisdiction over Unincorporated Business Entities: The Real Party in Interest as a Jurisdictional Rule, 56 Texas L. Rev. 243, 247–250 (1978). In *Wormley* v. *Wormley*, 8 Wheat. 421 (1823), for example, the Court stated:

> "This Court will not suffer its jurisdiction to be ousted by the mere joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interests before it, whenever it can be done without prejudice to the rights of others." *Id.*, at 451 (footnote omitted).

See also *Wood* v. *Davis*, 18 How. 467, 469 (1856) ("It has been repeatedly decided by this [C]ourt, that formal parties, or nominal parties, or parties without interest, united with the real parties to the litigation, cannot oust the federal courts of jurisdiction . . .").

The real party to the controversy approach has been implemented by the Court both in its oldest and in its most recent cases examining diversity jurisdiction with respect to business associations. In the Court's first examination of the corporate form to determine who must be counted for purposes of diversity jurisdiction, the Court invoked the real party to the controversy test and concluded that the citizenship of each shareholder must be counted for purposes of diversity jurisdiction. *Bank of United States* v. *Deveaux*, 5 Cranch, at 91–92. In *Deveaux*, the Court recognized that corporations had been considered as possessing "corporeal qualities," *id.*, at 89, but concluded that the actual parties to the controversy were "the members of the corporation . . . who come into court, in this case, under their corporate name." *Id.*, at 91. By 1854, the Court no longer characterized the corporation as merely possessing "corporeal qualities," but rather as a "juridical person," which made an even stronger case for recognizing a corporation as a proper party in its own right before the Court. See *Marshall* v. *Baltimore & Ohio R. Co.*, 16 How., at 328; see also *Louisville, C. & C. R. Co.* v. *Letson*, 2 How. 497, 558–559 (1844) (corporation is a person; shareholders' citizenship will not be counted).

In *Marshall*, as in *Deveaux*, however, the determination whether the corporation was a citizen did not signal the end of the diversity jurisdiction inquiry. 16 How., at 328. Rather, the Court engaged in a two-part inquiry: (1) is the corporation a "juridical person" which can serve as a real party to the controversy, see *id.*, at 327–329; and (2) are the shareholders real parties to the controversy. See *id.*, at 328. To determine whether the corporation or the shareholders were real parties to the controversy, the Court considered which citizens held control over the business decisions and assets of the corporation and over the initiation and course of litigation involving the corporation. The corporation, as the representative body of the shareholders, itself had such power. The shareholders did not.

> "[F]or all the purposes of acting, contracting, and judicial remedy, [shareholders] can speak, act, and plead, only through their representatives or curators. For the purposes of a suit or controversy, the persons represented by a corporate name can appear only by attorney, appointed by its constitutional organs. . . . [T]hey are not really parties to the suit or controversy." *Ibid.*

Having concluded that the shareholders were not the real parties to the controversy, the Court held that only the State of incorporation of the corporate entity need be counted for purposes of diversity jurisdiction and that the citizenship of the shareholders would be presumed to be that of the State of incorporation. *Id.*, at 328–329. As the Court makes plain in *Marshall*, consideration of whether the shareholders were real parties to the controversy was a necessary prerequisite to the creation of the legal fiction that their citizenship would be deemed that of the corporation.

In a series of three cases considering the citizenship of business associations following *Marshall*, the Court was not called upon to determine which of the citizens before it were the real parties to the controversy because the business associations were not citizens themselves and the members of each association held equivalent power and control over the association's assets, business, and litigation. In *Chapman* v. *Barney*, 129 U. S. 677 (1889), the Court addressed the issue whether a joint stock company was a citizen for purposes of diversity jurisdiction. A joint stock company, now a historical anomaly, see A. Bromberg, Crane and Bromberg on Partnership 178, and n. 16 (1968), had several features of the corporate form, *e. g.*, centralized management and transferability of shares, but was more like a general partnership in that each partner was personally liable and there was only one class of partners. See Comment, Limited Partnerships and Federal Diversity Jurisdiction, 45 U. Chi. L. Rev. 384, 389, and n. 32 (1978). Each "partner" had equal power over the conduct of the business by virtue of his power to elect and control the company's managers. Bromberg, *supra*, at 179, n. 19. The Court held that a joint stock company was a "mere partnership" and therefore not sufficiently similar to a corporation to justify designating it as a citizen. 129 U. S., at 682. Hence, the citizenship of each owner had to be counted for purposes of diversity jurisdiction. Because the joint stock company owners were similarly situated in terms of power and control over the company and possessed all of the power that could be exercised over the company's business and litigation, and the company itself was not a citizen, the Court was not called upon to determine which of the citizens before it were the real parties to the controversy.

The Court applied a similar approach in *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449 (1900), when it examined a limited partnership association. Quite unlike the modern limited partnership, the limited partnership association at issue in *Great Southern*, recognized by very few States, Comment, 45 U. Chi. L. Rev., *supra*, at 389, n. 36, was a species of business association involving a single class of partners with limited liability who exercised control over the operation of the business by annually electing the managers of the association. See, *e. g.*, 1874 Pa. Laws, Act. No. 153, §§2, 5; Comment, 45 U. Chi. L. Rev., *supra*, at 389, n. 36. Not surprisingly, the Court viewed such an organization as more like a partnership than a corporation. See F. Burdick, Law of Partnership 361–362 (1899) (limited partnership association like corporation in some respects, but generally treated by the courts as a general partnership). As in the case of the joint stock company, because all partners were similarly situated in terms of power and control over the company, there was no reason for the Court to inquire who, among the partners, were the real parties to the controversy.

In *Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U. S. 145 (1965), the Court addressed whether a labor union could be treated as an entity for purposes of diversity jurisdiction. The Court held that a labor union is not a juridical person and, therefore, not a citizen for purposes of diversity jurisdiction. See *Mesa Operating Limited Partnership* v. *Louisiana Intrastate Gas Corp.*, 797 F. 2d 238, 240–241 (CA5 1986) (union in *Bouligny* failed to meet party to controversy test). There was no indication that any of the union members had any greater power over the litigation or the union's business and assets than any other member, and, therefore, as in *Chapman* and *Great Southern*, the Court was not called upon to decide which of the citizens before it were real parties to the controversy.

In the next case, in which application of the real party to the controversy test was appropriate, the Court unanimously applied it. See *Navarro Savings Assn.* v. *Lee*, 446 U. S., at 460, 464–465; *id.*, at 469, 475 (BLACKMUN, J., dissenting). In that case, the Court addressed the question whether the beneficiaries' citizenship must be counted when the trustees brought suit involving the assets of the trust. See *id.*, at 458. Because the trust beneficiaries lacked both control over the conduct of the business and the ability to initiate or control the course of litigation, the Court held that the citizenship of the trust beneficiaries should not be counted. *Id.*, at 464–465.

As *Navarro* makes clear, the nature of the named party does not settle the question of who are the real parties to the controversy. In fact, if the Court's characterization of the issue before us were correct, *ante*, at 187–188, n. 1, then we seriously erred in *Navarro Savings Assn.* v. *Lee*, *supra*, at 464–466, when we considered whether the trust beneficiaries were the real parties to the controversy, in light of the fact that they were not named parties to the litigation.

The Court attempts to distinguish *Navarro* on the ground that it involved not a juridical person, but rather the "distinctive common-law institution of trustees." *Ante*, at 194. Such a view is consonant with the Court's new diversity jurisdiction analysis announced in this case, but fails to take into account the actual language and analysis in *Navarro*. If the nature of the institution of trustees was sufficient to answer the question of which parties to count for diversity jurisdiction purposes in that case, the Court's discussion of whether the trust beneficiaries were real parties to the controversy would have been wholly superfluous. Given that the Court granted certiorari in that case on the very issue whether the citizenship of trust beneficiaries must be counted, and then unanimously applied the real parties to the controversy test, the discussion clearly was not superfluous.

Application of the parties to the controversy test to the limited partnership yields the conclusion that limited partners should not be considered for purposes of diversity jurisdiction. Like the trust beneficiary in *Navarro*, the limited partner "can neither control the disposition of this action nor intervene in the affairs of the trust except in the most extraordinary situations." *Navarro*, *supra*, at 464–465. See Uniform Limited Partnership Act § 26, 6 U. L. A. 614 (1969) (limited partner "is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership"); Uniform Limited Partnership Act § 1001, 6 U. L. A. 371 (Supp. 1989) (derivative actions); Ariz. Rev. Stat. Ann. § 29–324 (1989) (general partners of limited partnership have duties and obligations of partners to general partnership); § 29–209 (general partner is agent of partnership); § 29–356 (limited partners limited to derivative actions); Arkoma Associates Partnership Agreement, Art. VI, § 6.1 (general partners have "exclusive and complete control of the operations"); *id.*, § 7.1 (limited partners "shall not take any part in the control or management of . . . Partnership"). And like the shareholder in *Marshall*, "for all the purposes of acting, contracting, and judicial remedy, [limited partners] can speak, act, and plead, only through [others]." *Marshall*, 16 How., at 328. In fact, the limited partner has even less power in the limited partnership than the shareholder does in a corporation. "[T]he shareholder . . . retain[s] some measure of control over management through his voting power, while the more restricted role of the limited partner permits restraint [of management] only by his refusal to concur in certain acts for which his consent is required by law." See Note, Standing of Limited Partners to Sue Derivatively, 65 Colum. L. Rev. 1463, 1478 (1965). Without the power to "control . . . the assets" or to initiate or "control the litigation," *Navarro*, *supra*, at 465, the limited partner is not a real party to the controversy and, therefore, should not be counted for purposes of diversity jurisdiction. Because the majority of States have adopted the Uniform Limited Partnership Act, this rule would result in uniform treatment of limited partners for purposes of diversity jurisdiction. See Uniform Limited Partnership Act, 6 U. L. A. 172, 220 (Supp. 1989).

The commentators are in agreement that the party to the controversy test is the appropriate test to be applied to determine diversity jurisdiction with respect to limited partnerships and that the citizenship of limited partners should not be counted. See, *e. g.*, Comment, 45 U. Chi. L. Rev., at 418 (citizenship of limited partners should not be counted for purposes of diversity jurisdiction); Note, Who Are the Real Parties In Interest for Purposes of Determining Diversity Jurisdiction for Limited Partnerships?, 61 Wash. U. L. Q. 1051, 1066–1067 (1984) (same); Note, 56 Texas L. Rev., at 250–251 (real party in interest test should be applied to unincorporated business associations to determine whom to count for diversity); see also *Colonial Realty Corp.* v. *Bache & Co.*, 358 F. 2d 178, 183 (1966) (Friendly, J.) (citizenship of limited partner should not be counted where state law declares partner is not "proper party to proceedings by or against a partnership").

The concern perhaps implicit in the Court's holding today is that failure to consider the citizenship of all the members of an unincorporated business association will expand diversity jurisdiction at a time when our federal courts are already seriously overburdened. This concern is more illusory than real in the context of unincorporated business associations. For, despite the Court's holding today, unincorporated associations may gain access to the federal courts by bringing or defending suit as a Rule 23 class action, in which case the citizenship of the members of the class would not be considered. See Federal Diversity Jurisdiction—Citizenship for Unincorporated Associations, 19 Vand. L. Rev. 984, 991–992 (1966). Thus, I see little reason to depart in this case from our long settled practice of applying the real parties to the controversy test.

Because there is complete diversity between petitioners and the limited partnership (assuming that it should be considered a citizen) and each of the general partners, the issue presented by this case is fully resolved by application of the parties to the controversy test.

III

Even though the case does not directly relate to the issue before us, the Court takes pains to address and distinguish *Puerto Rico* v. *Russell & Co.*, 288 U. S. 476 (1933). See *ante*, at 189–190. The issue in *Russell* was not diversity, but whether the suit against the *sociedad en comandita* could be removed from the Insular Court to the United States District Court for Puerto Rico on the ground that no party on one side was a citizen of or domiciled in Puerto Rico. See 288 U. S., at 478. None of the partners were citizens of Puerto Rico, but the Court determined that the *sociedad* was and, therefore, removal was precluded. Thus, *Russell* tells us nothing about whether the citizenship of the *sociedad*'s members, unlimited or limited, should be considered for purposes of diversity jurisdiction.

In any event, the Court's attempts to distinguish *Russell* are seriously flawed. In *Russell*, the Court examined the Puerto Rican *sociedad en comandita*, which is the civil law version of the modern limited partnership. The Court delineated a series of factors and concluded that, under civil law, the *sociedad* was a "juridical person." *Id.*, at 481. Ironically, the Court in this case endorses the holding of *Russell*, despite the fact that virtually all of the factors listed are equally applicable to the modern limited partnership. The Court fails to acknowledge that our modern limited partnership, like the *sociedad*, finds its origins in the civil law. The limited partnership originated in Europe in the middle ages, first appearing in France "[u]nder the name of *la Société en comandite*, . . . mention being made of it in the most ancient commercial records, and in the early mercantile regulations of Marseilles and Montpelier." *Ames* v. *Downing*, 1 Bradf. Surr. 321, 329 (N. Y. 1850). The limited partnership did not find acceptance in the United Kingdom and was not a creature of the common law. F. Burdick, Law of Partnership 384–385 (2d ed. 1906). It was first introduced into this country in Louisiana and then New York. See Note, 65 Colum. L. Rev., at 1464. Although a "'creation of the civil law,'" the Puerto Rican *sociedad* was hardly "'exotic.'" *Ante*, at 190 (quoting *Bouligny*, 382 U. S., at 151). Rather, it is yet one of many forms of the limited partnership descended from the ancient French *Société* as is the modern limited partnership adopted in this country. See *Ames*, *supra*, at 329–330 (American limited "partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood and regulated"). It is hardly an answer to the history of the limited partnership in this country and abroad to assert that it appears 25 years after *Steelworkers* v. *R. H. Bouligny, Inc.*, 382 U. S. 145 (1965). See *ante*, at 190–191, n. 2. The "admirable consistency of our jurisprudence," *ante*, at 189, is not blemished by distinguishing between unions and limited partnerships. It is, however, severely marred by holding that an association within the continental United States is not afforded the same treatment as its virtually identical Puerto Rican counterpart. See also *ante*, at 191, n. 2 ("operative word in both the diversity statute and the removal statute at issue in *Russell* is 'citizens'"). The Court's decision today, endorsing treatment of a Puerto Rican business association as an entity while refusing to treat as an entity its virtually identical stateside counterpart, is justified neither by our precedents nor by historical and commercial realities.

For the foregoing reasons, I respectfully dissent.

WASHINGTON ET AL. *v.* HARPER

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 88-599. Argued October 11, 1989—Decided February 27, 1990

Respondent Harper has been a ward of the Washington state penal system since his 1976 robbery conviction. Both as an inmate and while temporarily on parole, he received psychiatric treatment, including the consensual administration of antipsychotic drugs. He has engaged in violent conduct, and his condition has deteriorated when he did not take the drugs. On two occasions, he was transferred to the Special Offender Center (SOC or Center), a state institute for convicted felons with serious mental illness, where he was diagnosed as suffering from a manic-depressive disorder. While at the Center, he was required to take antipsychotic drugs against his will pursuant to an SOC Policy. The Policy provides, *inter alia*, that, if a psychiatrist orders such medication, an inmate may be involuntarily treated only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself or others; that, after a hearing and upon a finding that the above conditions are met, a special committee consisting of a psychiatrist, a psychologist, and a Center official, none of whom may be currently involved in the inmate's diagnosis or treatment, may order involuntary medication if the psychiatrist is in the majority; and that the inmate has the right to notice of the hearing, the right to attend, present evidence, and cross-examine witnesses, the right to representation by a disinterested lay adviser versed in the psychological issues, the right to appeal to the Center's Superintendent, and the right to periodic review of any involuntary medication ordered. In addition, state law gives him the right to state-court review of the committee's decision. Both of the involuntary treatment proceedings were conducted in accordance with the SOC Policy. During his second stay at the Center, but before his transfer to a state penitentiary, Harper filed suit in state court under 42 U. S. C. § 1983. The trial court rejected his claim that the failure to provide a judicial hearing before the involuntary administration of antipsychotic medication violated the Due Process Clause of the Fourteenth Amendment. The State Supreme Court reversed and remanded, concluding that, under the Clause, the State could administer such medication to a competent, nonconsenting inmate only if, in a judicial hearing at which the inmate had the full panoply of adversarial procedural protections, the State proved by "clear, cogent, and convincing" evidence that the medication was both necessary and effective for furthering a compelling state interest.

Held:

1. The case is not rendered moot by the fact that the State has ceased administering antipsychotic drugs to Harper against his will. A live case or controversy remains, since there is no evidence that Harper has recovered from his mental illness; he continues to serve his sentence in the state prison system; and there is a strong likelihood that he may again be transferred to the Center, where officials would seek to administer antipsychotic medication pursuant to the Policy. Thus, the alleged injury likely would recur but for the decision of the State Supreme Court. Pp. 218–219.

2. The Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if he is dangerous to himself or others and the treatment is in his medical interest. Although Harper has a liberty interest under the Clause in being free from the arbitrary administration of such medication, the Policy comports with substantive due process requirements, since it is reasonably related to the State's legitimate interest in combating the danger posed by a violent, mentally ill inmate. The Policy is a rational means of furthering that interest, since it applies exclusively to mentally ill inmates who are gravely disabled or represent a significant danger to themselves or others; the drugs may be administered only for treatment and under the direction of a licensed psychiatrist; and there is little dispute in the psychiatric profession that the proper use of the drugs is an effective means of treating and controlling a mental illness likely to cause violent behavior. Harper's contention that, as a precondition to antipsychotic drug treatment, the State must find him incompetent, and then obtain court approval of the treatment using a "substituted judgment" standard, is rejected, since it does not take account of the State's legitimate interest in treating him where medically appropriate for the purpose of reducing the danger he poses. Similarly, it has not been shown that the alternatives of physical restraints or seclusion would accommodate his rights at *de minimis* cost to valid penological interests. Pp. 219–227.

3. The Policy's administrative hearing procedures comport with procedural due process. Pp. 228–236.

(a) The Due Process Clause does not require a judicial hearing before the State may treat a mentally ill prisoner with antipsychotic drugs against his will. Harper's not insubstantial liberty interest, when considered with the government interests involved and the efficacy of the particular procedural requirements, is adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge. It cannot be assumed that a mentally disturbed patient's intentions, or a substituted judgment approximating those intentions, can be determined in a single judicial hearing apart from the realities of frequent and ongoing medical observation. Nor can it be ignored that requiring judicial hearings will divert scarce prison resources from the care and treatment of mentally ill inmates. Moreover, the risks associated with antipsychotic drugs are for the most part medical ones, best assessed by medical professionals. The Policy contains adequate procedural safeguards to ensure that the prisoner's interests are taken into account. In particular, the independence of the decisionmaker is adequately addressed, since none of the hearing committee members may be involved in the inmate's current treatment or diagnosis, and the record is devoid of evidence that staff members lack the necessary independence to provide a full and fair hearing. Pp. 228–235.

(b) The Policy's procedures satisfy due process requirements in all other respects. The provisions mandating notice and the specified hearing rights satisfy the requirement of a meaningful opportunity to be heard, and are not vitiated by prehearing meetings between the committee members and staff absent evidence of resulting bias or that the actual decision is made before the hearing. The hearing need not be conducted in accordance with the rules of evidence, and the state court's "clear, cogent, and convincing" standard of proof is neither required nor helpful when medical personnel are making the judgment required by the Policy. An inmate may obtain judicial review of the committee's decision, and the trial court found that the record compiled under the Policy was adequate to allow such a review. Nor is the Policy deficient in not allowing representation by counsel, since the provision of an independent lay adviser who understands the psychiatric issues is sufficient protection given the medical nature of the decision to be made. Pp. 235–236.

110 Wash. 2d 873, 759 P. 2d 358, reversed and remanded.

KENNEDY, J., delivered the opinion for a unanimous Court with respect to Part II, and the opinion of the Court with respect to Parts I, III, IV, and V, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. BLACKMUN, J., filed a concurring opinion, *post*, p. 236. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined, *post*, p. 237.

William L. Williams, Senior Assistant Attorney General of Washington, argued the cause for petitioners. With him on the briefs were *Kenneth O. Eikenberry*, Attorney General, and *Glenn L. Harvey*, Assistant Attorney General.

Paul J. Larkin, Jr., argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief was *William C. Bryson,* Acting Solicitor General.

Brian Reed Phillips, by appointment of the Court, 490 U. S. 1002, argued the cause for respondent. With him on the brief was *Leonard Rubenstein.**

JUSTICE KENNEDY delivered the opinion of the Court.

The central question before us is whether a judicial hearing is required before the State may treat a mentally ill prisoner with antipsychotic drugs against his will. Resolution of the case requires us to discuss the protections afforded the prisoner under the Due Process Clause of the Fourteenth Amendment.

I

Respondent Walter Harper was sentenced to prison in 1976 for robbery. From 1976 to 1980, he was incarcerated at the Washington State Penitentiary. Most of that time, respondent was housed in the prison's mental health unit, where he consented to the administration of antipsychotic drugs.

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*Briefs of *amici curiae* urging reversal were filed for the State of California by *John K. Van de Kamp,* Attorney General, *Richard B. Iglehart,* Chief Assistant Attorney General, *Kenneth C. Young,* Assistant Attorney General, *Kristofer Jorstad,* Senior Supervising Deputy Attorney General, and *Morris Lenk, Karl S. Mayer,* and *Bruce M. Slavin,* Deputy Attorneys General; and for the American Psychiatric Association et al. by *Joel I. Klein* and *Robert D. Luskin.*

Briefs of *amici curiae* urging affirmance were filed for the Mental Health Legal Advisors Committee of the Massachusetts Supreme Judicial Court et al. by *Stan Goldman, Robert D. Fleischner,* and *Steven J. Schwartz;* for the National Association of Protection and Advocacy Systems et al. by *Arthur J. Rosenberg;* and for the New Jersey Department of the Public Advocate by *Linda G. Rosenzweig.*

Briefs of *amici curiae* were filed for the American Psychological Association by *Clifford D. Stromberg* and *John G. Roberts, Jr.;* for the Coalition for the Fundamental Rights and Equality of Ex-Patients by *Peter Margulies;* and for the Washington Community Mental Health Council et al. by *Barbara A. Weiner.*

Antipsychotic drugs, sometimes called "neuroleptics" or "psychotropic drugs," are medications commonly used in treating mental disorders such as schizophrenia. Brief for American Psychiatric Association et al. as *Amici Curiae* 2–3, n. 1. As found by the trial court, the effect of these and similar drugs is to alter the chemical balance in the brain, the desired result being that the medication will assist the patient in organizing his or her thought processes and regaining a rational state of mind. See App. to Pet. for Cert. B–7.[1]

Respondent was paroled in 1980 on the condition that he participate in psychiatric treatment. While on parole, he continued to receive treatment at the psychiatric ward at Harborview Medical Center in Seattle, Washington, and was later sent to Western State Hospital pursuant to a civil commitment order. In December 1981, the State revoked respondent's parole after he assaulted two nurses at a hospital in Seattle.

Upon his return to prison, respondent was sent to the Special Offender Center (SOC or Center), a 144-bed correctional institute established by the Washington Department of Corrections to diagnose and treat convicted felons with serious mental disorders. At the Center, psychiatrists first diagnosed respondent as suffering from a manic-depressive disorder.[2] At first, respondent gave voluntary consent to treatment, including the administration of antipsychotic medications. In November 1982, he refused to continue taking the prescribed medications. The treating physician then sought to medicate respondent over his objections, pursuant to SOC Policy 600.30.

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[1] The drugs administered to respondent included Trialafon, Haldol, Prolixin, Taractan, Loxitane, Mellaril, and Navane. See App. to Pet. for Cert. B–7. Like the Washington Supreme Court, we limit our holding to the category of antipsychotic drugs. See 110 Wash. 2d 873, 876, n. 3, 759 P. 2d 358, 361, n. 3 (1988).

[2] Since that initial diagnosis, respondent has also been thought to have been suffering from schizo-affective disorder, and his current diagnosis is that he is schizophrenic.

Policy 600.30 was developed in partial response to this Court's decision in *Vitek* v. *Jones*, 445 U. S. 480 (1980). The Policy has several substantive and procedural components. First, if a psychiatrist determines that an inmate should be treated with antipsychotic drugs but the inmate does not consent, the inmate may be subjected to involuntary treatment with the drugs only if he (1) suffers from a "mental disorder" and (2) is "gravely disabled" or poses a "likelihood of serious harm" to himself, others, or their property.[3] Only a psychiatrist may order or approve the medication. Second, an inmate who refuses to take the medication voluntarily is entitled to a hearing before a special committee consisting of a psychiatrist, a psychologist, and the Associate Superintendent of the Center, none of whom may be, at the time of the hearing, involved in the inmate's treatment or diagnosis. If the committee determines by a majority vote that the inmate suffers from a mental disorder and is gravely disabled or dangerous, the inmate may be medicated against his will, provided the psychiatrist is in the majority.

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[3] The Policy's definitions of the terms "mental disorder," "gravely disabled," and "likelihood of serious harm" are identical to the definitions of the terms as they are used in the state involuntary commitment statute. See App. to Pet. for Cert. B–3. "Mental disorder" means "any organic, mental, or emotional impairment which has substantial adverse effects on an individual's cognitive or volitional functions." Wash. Rev. Code § 71.05.020(2) (1987). "Gravely disabled" means "a condition in which a person, as a result of a mental disorder: (a) [i]s in danger of serious physical harm resulting from a failure to provide for his essential human needs of health or safety, or (b) manifests severe deterioration in routine functioning evidenced by repeated and escalating loss of cognitive or volitional control over his or her actions and is not receiving such care as is essential for his or her health or safety." § 71.05.020(1). "Likelihood of serious harm" means "either: (a) [a] substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (b) a substantial risk that physical harm will be inflicted by an individual upon another, as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (c) a substantial risk that physical harm will be inflicted by an individual upon the property of others, as evidenced by behavior which has caused substantial loss or damage to the property of others." § 71.05.020(3).

Third, the inmate has certain procedural rights before, during, and after the hearing. He must be given at least 24 hours' notice of the Center's intent to convene an involuntary medication hearing, during which time he may not be medicated. In addition, he must receive notice of the tentative diagnosis, the factual basis for the diagnosis, and why the staff believes medication is necessary. At the hearing, the inmate has the right to attend; to present evidence, including witnesses; to cross-examine staff witnesses; and to the assistance of a lay adviser who has not been involved in his case and who understands the psychiatric issues involved. Minutes of the hearing must be kept, and a copy provided to the inmate. The inmate has the right to appeal the committee's decision to the Superintendent of the Center within 24 hours, and the Superintendent must decide the appeal within 24 hours after its receipt. See App. to Pet. for Cert. B–3. The inmate may seek judicial review of a committee decision in state court by means of a personal restraint petition or extraordinary writ. See Wash. Rules App. Proc. 16.3 to 16.17; App. to Pet. for Cert. B–8.

Fourth, after the initial hearing, involuntary medication can continue only with periodic review. When respondent first refused medication, a committee, again composed of a nontreating psychiatrist, a psychologist, and the Center's Associate Superintendent, was required to review an inmate's case after the first seven days of treatment. If the committee reapproved the treatment, the treating psychiatrist was required to review the case and prepare a report for the Department of Corrections medical director every 14 days while treatment continued.[4]

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[4] The Policy was later amended to allow treatment for up to 14 days after the first hearing. Further treatment could be authorized only after the same committee conducted a second hearing on the written record. Thereafter, the treating psychiatrist was required to submit biweekly re-

In this case, respondent was absent when members of the Center staff met with the committee before the hearing. The committee then conducted the hearing in accordance with the Policy, with respondent being present and assisted by a nurse practitioner from another institution. The committee found that respondent was a danger to others as a result of a mental disease or disorder, and approved the involuntary administration of antipsychotic drugs. On appeal, the Superintendent upheld the committee's findings. Beginning on November 23, 1982, respondent was involuntarily medicated for about one year. Periodic review occurred in accordance with the Policy.

In November 1983, respondent was transferred from the Center to the Washington State Reformatory. While there, he took no medication, and as a result, his condition deteriorated. He was retransferred to the Center after only one month. Respondent was the subject of another committee hearing in accordance with Policy 600.30, and the committee again approved medication against his will. Respondent continued to receive antipsychotic drugs, subject to the required periodic reviews, until he was transferred to the Washington State Penitentiary in June 1986.

In February 1985, respondent filed suit in state court under 42 U. S. C. § 1983 (1982 ed.) against various individual defendants and the State, claiming that the failure to provide a judicial hearing before the involuntary administration of antipsychotic medication violated the Due Process, Equal Protection, and Free Speech Clauses of both the Federal and State Constitutions, as well as state tort law. He sought both damages and declaratory and injunctive relief. After a bench trial in March 1987, the court held that, although respondent had a liberty interest in not being subjected to the involuntary administration of antipsychotic medication, the

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ports to the Department of Corrections medical director. At the end of 180 days, a new hearing was required to consider the need for continued treatment.

procedures contained in the Policy met the requirements of due process as stated in *Vitek*.

On appeal, the Washington Supreme Court reversed and remanded the case to the trial court. 110 Wash. 2d 873, 759 P. 2d 358 (1988). Agreeing with the trial court that respondent had a liberty interest in refusing antipsychotic medications, the court concluded that the "highly intrusive nature" of treatment with antipsychotic medications warranted greater procedural protections than those necessary to protect the liberty interests at stake in *Vitek*. 110 Wash. 2d, at 880–881, 759 P. 2d, at 363. It held that, under the Due Process Clause, the State could administer antipsychotic medication to a competent, nonconsenting inmate only if, in a judicial hearing at which the inmate had the full panoply of adversarial procedural protections, the State proved by "clear, cogent, and convincing" evidence that the administration of antipsychotic medication was both necessary and effective for furthering a compelling state interest.[5] *Id.*, at 883–884, 759 P. 2d, at 364–365.

We granted certiorari, 489 U. S. 1064 (1989), and we reverse.

II

Respondent contends that because the State has ceased administering antipsychotic drugs to him against his will, the case is moot. We disagree.

Even if we confine our attention to those facts found in the record,[6] a live case or controversy between the parties remains. There is no evidence that respondent has recovered from his mental illness. Since being sentenced to prison in 1976, he has been diagnosed and treated for a serious mental disorder. Even while on parole, respondent continued to receive treatment, at one point under a civil commitment order, at state mental hospitals. At the time of trial, after his transfer from the Center for a second time, respondent was still diagnosed as suffering from schizophrenia.

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[5] Because it decided the case on due process grounds, the court did not address respondent's equal protection or free speech claims, and they are not before us here. The court also concluded that the individual defendants were entitled to qualified immunity, but remanded the case to the lower court for further consideration of respondent's claims for injunctive and declaratory relief under § 1983, as well as of his claims under state law. See 110 Wash. 2d, at 885–886, 759 P. 2d, at 366.

[6] In response to our questions at oral argument, counsel for the State informed us that respondent was transferred back to the Center in April 1987 and involuntarily medicated pursuant to the Policy from September

Respondent continues to serve his sentence in the Washington state prison system, and is subject to transfer to the Center at any time. Given his medical history, and the fact that he has been transferred not once but twice to the Center from other state penal institutions during the period 1982–1986, it is reasonable to conclude that there is a strong likelihood that respondent may again be transferred to the Center. Once there, given his medical history, it is likely that, absent the holding of the Washington Supreme Court, Center officials would seek to administer antipsychotic medications pursuant to Policy 600.30.

On the record before us, the case is not moot. The alleged injury likely would recur but for the decision of the Washington Supreme Court. This sufficiently overcomes the claim of mootness in the circumstances of the case and under our precedents. See *Vitek*, 445 U. S., at 486–487.

III

The Washington Supreme Court gave its primary attention to the procedural component of the Due Process Clause. It phrased the issue before it as whether "a prisoner [is] entitled to a judicial hearing before antipsychotic drugs can be administered against his will." 110 Wash. 2d, at 874, 759 P. 2d, at 360. The court, however, did more than establish ju-

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1987 until May 1988. Counsel also informed us that, at the time of oral argument, respondent was at a state mental hospital for a competency determination on an unrelated criminal charge, and that regardless of the outcome of this criminal charge, respondent will return to the state prison system to serve the remainder of his sentence.

dicial procedures for making the factual determinations called for by Policy 600.30. It required that a different set of determinations than those set forth in the Policy be made as a precondition to medication without the inmate's consent. Instead of having to prove, pursuant to the Policy, only that the mentally ill inmate is "gravely disabled" or that he presents a "serious likelihood of harm" to himself or others, the court required the State to prove that it has a compelling interest in administering the medication and that the administration of the drugs is necessary and effective to further that interest. The decisionmaker was required further to consider and make written findings regarding either the inmate's desires or a "substituted judgment" for the inmate analogous to the medical treatment decision for an incompetent person. *Id.*, at 883–884, 759 P. 2d, at 365.

The Washington Supreme Court's decision, as a result, has both substantive and procedural aspects. It is axiomatic that procedural protections must be examined in terms of the substantive rights at stake. But identifying the contours of the substantive right remains a task distinct from deciding what procedural protections are necessary to protect that right. "[T]he substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." *Mills* v. *Rogers*, 457 U. S. 291, 299 (1982) (citations omitted).

Restated in the terms of this case, the substantive issue is what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will; the procedural issue is whether the State's nonjudicial mechanisms used to determine the facts in a particular case are sufficient. The Washington Supreme Court in effect ruled upon the substance of the inmate's right, as well as the procedural guarantees, and both are encompassed by our grant of certiorari.[7] We address these questions beginning with the substantive one.

As a matter of state law, the Policy itself undoubtedly confers upon respondent a right to be free from the arbitrary administration of antipsychotic medication. In *Hewitt* v. *Helms*, 459 U. S. 460 (1983), we held that Pennsylvania had created a protected liberty interest on the part of prison inmates to avoid administrative segregation by enacting regulations that "used language of an unmistakably mandatory character, requiring that certain procedures 'shall,' 'will,' or 'must' be employed, and that administrative segregation will not occur absent specified substantive predicates—viz., 'the need for control,' or 'the threat of a serious disturbance.'" *Id.*, at 471–472 (citations omitted). Policy 600.30 is similarly mandatory in character. By permitting a psychiatrist to treat an inmate with antipsychotic drugs against his wishes only if he is found to be (1) mentally ill and (2) gravely disabled or dangerous, the Policy creates a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist. See also *Vitek*, 445 U. S., at 488–491.

We have no doubt that, in addition to the liberty interest created by the State's Policy, respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the

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[7] The two questions presented by the State in its petition for certiorari mirror the division between the substantive and procedural aspects of this case. In addition to seeking a grant of certiorari on the question whether respondent was entitled to "a judicial hearing and attendant adversarial procedural protections" prior to the involuntary administration of antipsychotic drugs, the State sought certiorari on the question, assuming that respondent "possesses a constitutionally protected liberty interest in refusing medically prescribed antipsychotic medication," whether the State must "prove a compelling state interest . . . or [whether] the 'reasonable relation' standard of *Turner* v. *Safley*, [482 U. S. 78 (1987),] control[s]." Pet. for Cert. i.

Fourteenth Amendment. See *id.*, at 491–494; *Youngberg* v. *Romeo*, 457 U. S. 307, 316 (1982); *Parham* v. *J. R.*, 442 U. S. 584, 600–601 (1979). Upon full consideration of the state administrative scheme, however, we find that the Due Process Clause confers upon respondent no greater right than that recognized under state law.

Respondent contends that the State, under the mandate of the Due Process Clause, may not override his choice to refuse antipsychotic drugs unless he has been found to be incompetent, and then only if the factfinder makes a substituted judgment that he, if competent, would consent to drug treatment. We disagree. The extent of a prisoner's right under the Clause to avoid the unwanted administration of antipsychotic drugs must be defined in the context of the inmate's confinement. The Policy under review requires the State to establish, by a medical finding, that a mental disorder exists which is likely to cause harm if not treated. Moreover, the fact that the medication must first be prescribed by a psychiatrist, and then approved by a reviewing psychiatrist, ensures that the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement.[8] These standards, which recognize both the prisoner's medical interests and the State's interests, meet the demands of the Due Process Clause.

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[8] JUSTICE STEVENS contends that the SOC Policy permits respondent's doctors to treat him with antipsychotic medications against his will without reference to whether the treatment is medically appropriate. See *post*, at 243–245. For various reasons, we disagree. That an inmate is mentally ill and dangerous is a necessary condition to medication, but not a sufficient condition; before the hearing committee determines whether these requirements are met, the inmate's treating physician must first make the decision that medication is appropriate. The SOC is a facility whose purpose is not to warehouse the mentally ill, but to diagnose and treat convicted felons, with the desired goal being that they will recover to the point where they can function in a normal prison environment. App. to Pet. for Cert. B–2. In keeping with this purpose, an SOC psychiatrist must first prescribe the antipsychotic medication for the inmate, and the inmate must refuse it, before the Policy is invoked. Unlike JUSTICE STEVENS, we will not assume that physicians will prescribe these drugs for reasons unrelated to the medical needs of the patients; indeed, the ethics of the medical profession are to

The legitimacy, and the necessity, of considering the State's interests in prison safety and security are well established by our cases. In *Turner* v. *Safley*, 482 U. S. 78 (1987), and *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342 (1987), we held that the proper standard for determining the validity of a prison regulation claimed to infringe on an inmate's constitutional rights is to ask whether the regulation is "reasonably related to legitimate penological interests." *Turner, supra*, at 89. This is true even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review. *Estate of Shabazz, supra*, at 349. The Washington Supreme Court declined to apply this standard of review to the Center's Policy, reasoning that the liberty interest present here was distinguishable from the First Amendment rights at issue in both *Turner* and *Estate of Shabazz*. 110 Wash. 2d, at 883, n. 9, 759 P. 2d, at 364, n. 9. The court erred in refusing to apply the standard of reasonableness.

Our earlier determination to adopt this standard of review was based upon the need to reconcile our longstanding adherence to the principle that inmates retain at least some constitutional rights despite incarceration with the recognition that prison authorities are best equipped to make difficult

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the contrary. See Hippocratic Oath; American Psychiatric Association, Principles of Medical Ethics With Annotations Especially Applicable to Psychiatry, in Codes of Professional Responsibility 129–135 (R. Gorlin ed. 1986). This consideration supports our interpretation of the State's Policy as ensuring that antipsychotic medications will be administered only in those cases where appropriate by medical standards. We therefore agree with the State's representations at oral argument that, under the Policy, antipsychotic medications can be administered only for treatment purposes, with the hearing committee reviewing the doctor's decision to ensure that what has been prescribed is appropriate. See Tr. of Oral Arg. 13, 16.

decisions regarding prison administration. *Turner, supra,* at 84–85; *Jones* v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U. S. 119, 128 (1977). These two principles apply in all cases in which a prisoner asserts that a prison regulation violates the Constitution, not just those in which the prisoner invokes the First Amendment. We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights. See *Turner,* 482 U. S., at 85 ("Our task . . . is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights'") (citation omitted); *id.*, at 89 ("If *Pell, Jones,* and *Bell* have not already resolved the question posed in [*Procunier* v.] *Martinez,* [416 U. S. 396 (1974),] we resolve it now: when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests"); *Estate of Shabazz, supra,* at 349 ("To ensure that courts afford appropriate deference to prison officials, we have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights"). In *Turner* itself we applied the reasonableness standard to a prison regulation that imposed severe restrictions on the inmate's right to marry, a right protected by the Due Process Clause. See *Turner, supra,* at 95–96 (citing *Zablocki* v. *Redhail,* 434 U. S. 374 (1978), and *Loving* v. *Virginia,* 388 U. S. 1 (1967)). Our precedents require application of the standard here.

In *Turner,* we considered various factors to determine the reasonableness of a challenged prison regulation. Three are relevant here. "First, there must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U. S., at 89 (quoting *Block* v. *Rutherford*, 468 U. S. 576, 586 (1984)). Second, a court must consider "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." 482 U. S., at 90. Third, "the absence of ready alternatives is evidence of the reasonableness of a prison regulation," but this does not mean that prison officials "have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.*, at 90–91; see also *Estate of Shabazz*, *supra*, at 350.

Applying these factors to the regulation before us, we conclude that the Policy comports with constitutional requirements. There can be little doubt as to both the legitimacy and the importance of the governmental interest presented here. There are few cases in which the State's interest in combating the danger posed by a person to both himself and others is greater than in a prison environment, which, "by definition," is made up of persons with "a demonstrated proclivity for antisocial criminal, and often violent, conduct." *Hudson* v. *Palmer*, 468 U. S. 517, 526 (1984); *Jones*, *supra*, at 132; *Wolff* v. *McDonnell*, 418 U. S. 539, 561–562 (1974). We confront here the State's obligations, not just its interests. The State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution. Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, see *Hewitt*, 459 U. S., at 473, but also the duty to take reasonable measures for the prisoners' own safety. See *Hudson*, *supra*, at 526–527. These concerns have added weight when a penal institution, like the SOC, is restricted to inmates with mental illnesses. Where an inmate's mental disability is the root cause of the threat he poses to the inmate population, the State's interest in decreasing the danger to others necessarily encompasses an interest in providing him with medical treatment for his illness.

SOC Policy 600.30 is a rational means of furthering the State's legitimate objectives. Its exclusive application is to inmates who are mentally ill and who, as a result of their illness, are gravely disabled or represent a significant danger to themselves or others. The drugs may be administered for no purpose other than treatment, and only under the direction of a licensed psychiatrist. There is considerable debate over the potential side effects of antipsychotic medications, but there is little dispute in the psychiatric profession that proper use of the drugs is one of the most effective means of treating and controlling a mental illness likely to cause violent behavior.[9]

The alternative means proffered by respondent for accommodating his interest in rejecting the forced administration of antipsychotic drugs do not demonstrate the invalidity of the State's policy. Respondent's main contention is that, as a precondition to antipsychotic drug treatment, the State must find him incompetent, and then obtain court approval of the treatment using a "substituted judgment" standard. The suggested rule takes no account of the legitimate governmental interest in treating him where medically appropriate for the purpose of reducing the danger he poses. A rule that is in no way responsive to the State's legitimate interests is not a proper accommodation, and can be rejected out of hand. Nor are physical restraints or seclusion "alternative[s] that fully accommodat[e] the prisoner's rights at *de minimis* cost to valid penological interests." *Turner, supra,* at 91. Physical restraints are effective only in the short term, and can have serious physical side effects when used on a resisting inmate, see Brief for American Psychiatric Association et al. as *Amici Curiae* 12, as well as leaving the staff at risk of injury while putting the restraints on or tending to the inmate who is in them. Furthermore, respondent has failed to demonstrate that physical restraints or seclusion are acceptable substitutes for antipsychotic drugs, in terms of either their medical effectiveness or their toll on limited prison resources.[10]

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[9] See Brief for American Psychiatric Association et al. as *Amici Curiae* 10–11 ("Psychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia"); Brief for American Psychological Association as *Amicus Curiae* 6.

We hold that, given the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others and the treatment is in the inmate's medical interest. Policy 600.30 comports with these requirements; we therefore reject respondent's contention that its substantive standards are deficient under the Constitution.[11]

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[10] There is substantial evidence to the contrary. See Brief for American Psychiatric Association et al. as *Amici Curiae* 11–12; Soloff, Physical Controls: The Use of Seclusion and Restraint in Modern Psychiatric Practice, in Clinical Treatment of the Violent Person 119–137 (L. Roth ed. 1987) (documenting the risks and costs of using physical restraints and seclusion on violent patients).

[11] Perhaps suggesting that the care given to respondent and the Center's utilization of Policy 600.30 may have been suspect, JUSTICE STEVENS uses random citations from exhibits and documents submitted to the state trial court. By using isolated quotations of a few passages from medical and other records running into the hundreds of pages, JUSTICE STEVENS risks presenting a rather one-sided portrait of what they contain. An overview of these extensive materials reveals that respondent has a long history of serious, assaultive behavior, evidenced by at least 20 reported incidents of serious assaults on fellow inmates and staff. Respondent's doctors attributed these incidents to his severe mental illness and believed that his assaultive tendencies increased when he did not receive medication. See App. to Pet. for Cert. B–5. Respondent's opposition to the involuntary administration of antipsychotic drugs was premised at least in part upon his desire to self-medicate with street drugs, especially cocaine. See Lodging filed by Kenneth O. Eikenberry, Attorney General of Washington, Book 3, July 25, 1984, Progress Report. Finally, the records show without doubt that respondent has been the recipient of painstaking medical

IV

Having determined that state law recognizes a liberty interest, also protected by the Due Process Clause, which permits refusal of antipsychotic drugs unless certain preconditions are met, we address next what procedural protections are necessary to ensure that the decision to medicate an inmate against his will is neither arbitrary nor erroneous under the standards we have discussed above. The Washington Supreme Court held that a full judicial hearing, with the inmate being represented by counsel, was required by the Due Process Clause before the State could administer antipsychotic drugs to him against his will. In addition, the court held that the State must justify the authorization of involuntary administration of antipsychotic drugs by "clear, cogent, and convincing" evidence. We hold that the administrative hearing procedures set by the SOC Policy do comport with procedural due process, and conclude that the Washington Supreme Court erred in requiring a judicial hearing as a prerequisite for the involuntary treatment of prison inmates.

A

The primary point of disagreement between the parties is whether due process requires a judicial decisionmaker. As

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diagnosis and care while at the SOC. In any event, the trial court did not indicate which portions, if any, of these records, all of which are hearsay, it credited or relied upon in making its findings.

For these reasons, we do not intend to engage in a debate with JUSTICE STEVENS over how respondent's medical and institutional records should be interpreted. We rely upon the findings of the trial court that "at all times relevant to this action, [respondent] suffered from a mental disorder and as a result of that disorder constituted a likelihood of serious harm to others," App. to Pet. for Cert. B–8, and that "the medical treatment provided to [respondent] by defendants, including the administration of anti-psychotic medications, was consistent with the degree of care, skill, and learning expected of a reasonably prudent psychiatrist in the State of Washington, acting in the same or similar circumstances." *Ibid.* Contrary to JUSTICE STEVENS' cramped reading of this last finding, see *post*, at 245, n. 13, the breadth of its meaning equals the breadth of its language.

written, the Policy requires that the decision whether to medicate an inmate against his will be made by a hearing committee composed of a psychiatrist, a psychologist, and the Center's Associate Superintendent. None of the committee members may be involved, at the time of the hearing, in the inmate's treatment or diagnosis; members are not disqualified from sitting on the committee, however, if they have treated or diagnosed the inmate in the past. The committee's decision is subject to review by the Superintendent; if the inmate so desires, he may seek judicial review of the decision in a state court. See *supra*, at 216. Respondent contends that only a court should make the decision to medicate an inmate against his will.

The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case. *Morrissey* v. *Brewer*, 408 U. S. 471, 481 (1972); *Hewitt*, 459 U. S., at 472; *Greenholtz* v. *Nebraska Penal Inmates*, 442 U. S. 1, 12 (1979). The factors that guide us are well established. "Under *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976), we consider the private interests at stake in a governmental decision, the governmental interests involved, and the value of procedural requirements in determining what process is due under the Fourteenth Amendment." *Hewitt, supra*, at 473.

Respondent's interest in avoiding the unwarranted administration of antipsychotic drugs is not insubstantial. The forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty. Cf. *Winston* v. *Lee*, 470 U. S. 753 (1985); *Schmerber* v. *California*, 384 U. S. 757, 772 (1966). The purpose of the drugs is to alter the chemical balance in a patient's brain, leading to changes, intended to be beneficial, in his or her cognitive processes. See n. 1, *supra*. While the therapeutic benefits of antipsychotic drugs are well documented, it is also true that the drugs can have serious, even fatal, side effects. One such side effect identified by the trial court is acute dystonia, a severe involuntary spasm of the upper body, tongue, throat, or eyes. The trial court found that it may be treated and reversed within a few minutes through use of the medication Cogentin. Other side effects include akathesia (motor restlessness, often characterized by an inability to sit still); neuroleptic malignant syndrome (a relatively rare condition which can lead to death from cardiac dysfunction); and tardive dyskinesia, perhaps the most discussed side effect of antipsychotic drugs. See Finding of Fact 9, App. to Pet. for Cert. B–7; Brief for American Psychological Association as *Amicus Curiae* 6–9. Tardive dyskinesia is a neurological disorder, irreversible in some cases, that is characterized by involuntary, uncontrollable movements of various muscles, especially around the face. See *Mills*, 457 U. S., at 293, n. 1. The State, respondent, and *amici* sharply disagree about the frequency with which tardive dyskinesia occurs, its severity, and the medical profession's ability to treat, arrest, or reverse the condition. A fair reading of the evidence, however, suggests that the proportion of patients treated with antipsychotic drugs who exhibit the symptoms of tardive dyskinesia ranges from 10% to 25%. According to the American Psychiatric Association, studies of the condition indicate that 60% of tardive dyskinesia is mild or minimal in effect, and about 10% may be characterized as severe. Brief for American Psychiatric Association et al. as *Amici Curiae* 14–16, and n. 12; see also Brief for American Psychological Association as *Amicus Curiae* 8.[12]

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[12] JUSTICE STEVENS is concerned with "discount[ing] the severity of these drugs." See *post*, at 239, n. 5. As our discussion in the text indicates, we are well aware of the side effects and risks presented by these drugs; we also are well aware of the disagreements in the medical profession over the frequency, severity, and permanence of these side effects. We have set forth a fair assessment of the current state of medical knowledge about these drugs.

What JUSTICE STEVENS "discount[s]" are the benefits of these drugs, and the deference that is owed to medical professionals who have the full-

Notwithstanding the risks that are involved, we conclude that an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge. The Due Process Clause "has never been thought to require that the neutral and detached trier of fact be law trained or a judicial or administrative officer." *Parham*, 442 U. S., at 607. Though it cannot be doubted that the decision to medicate has societal and legal implications, the Constitution does not prohibit the State from permitting medical personnel to make the decision under fair procedural mechanisms. See *id.*, at 607–609; cf. *Youngberg*, 457 U. S., at 322–323. Particularly where the patient is mentally disturbed, his own intentions will be difficult to assess and will be changeable in any event. Schwartz, Vingiano, & Perez, Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication, 39 Hospital & Community Psychiatry 1049 (1988). Respondent's own history of accepting and then refusing drug treatment illustrates the point. We cannot make the facile assumption that the patient's intentions, or a substituted judgment approximating those intentions, can be determined in a single judicial hearing apart from the reali-

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time responsibility of caring for mentally ill inmates like respondent and who possess, as courts do not, the requisite knowledge and expertise to determine whether the drugs should be used in an individual case. After admitting that the proper administration of antipsychotic drugs is one of the most effective means of treating certain mental illnesses, JUSTICE STEVENS contends that the drugs are not indicated for "all patients," and then questions the appropriateness of the treatment provided to respondent. See *post*, at 248, n. 16. All concede that the drugs are not the approved treatment in all cases. As for whether respondent's medical treatment was appropriate, we are not so sanguine as to believe that on the basis of the limited record before us, we have the medical expertise and knowledge necessary to determine whether, on the basis of isolated parts of respondent's medical records, the care given to him is consistent with good medical practice. Again, we must defer to the finding of the trial court, unchallenged by any party in this case, that the medical care provided to respondent was appropriate under medical standards. See n. 11, *supra*.

ties of frequent and ongoing clinical observation by medical professionals. Our holding in *Parham* that a judicial hearing was not required prior to the voluntary commitment of a child to a mental hospital was based on similar observations:

> ". . . [D]ue process is not violated by use of informal, traditional medical investigative techniques. . . . The mode and procedure of medical diagnostic procedures is not the business of judges. . . .
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> . . . . .
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> "Although we acknowledge the fallibility of medical and psychiatric diagnosis, see *O'Connor* v. *Donaldson*, 422 U. S. 563, 584 (1975) (concurring opinion), we do not accept the notion that the shortcomings of specialists can always be avoided by shifting the decision from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer after a judicial-type hearing. Even after a hearing, the nonspecialist decisionmaker must make a medical-psychiatric decision. Common human experience and scholarly opinions suggest that the supposed protections of an adversary proceeding to determine the appropriateness of medical decisions for the commitment and treatment of mental and emotional illness may well be more illusory than real." *Parham*, 442 U. S., at 607–609.

Nor can we ignore the fact that requiring judicial hearings will divert scarce prison resources, both money and the staff's time, from the care and treatment of mentally ill inmates. See *id.*, at 605–606.

Under Policy 600.30, the decisionmaker is asked to review a medical treatment decision made by a medical professional. That review requires two medical inquiries: first, whether the inmate suffers from a "mental disorder"; and second, whether, as a result of that disorder, he is dangerous to himself, others, or their property. Under the Policy, the hearing committee reviews on a regular basis the staff's choice of both the type and dosage of drug to be administered, and can order appropriate changes. 110 Wash. 2d, at 875, 759 P. 2d, at 360. The risks associated with antipsychotic drugs are for the most part medical ones, best assessed by medical professionals. A State may conclude with good reason that a judicial hearing will not be as effective, as continuous, or as probing as administrative review using medical decisionmakers. We hold that due process requires no more.

A State's attempt to set a high standard for determining when involuntary medication with antipsychotic drugs is permitted cannot withstand challenge if there are no procedural safeguards to ensure the prisoner's interests are taken into account. Adequate procedures exist here. In particular, independence of the decisionmaker is addressed to our satisfaction by these procedures. None of the hearing committee members may be involved in the inmate's current treatment or diagnosis. The record before us, moreover, is limited to the hearings given to respondent. There is no indication that any institutional biases affected or altered the decision to medicate respondent against his will. The trial court made specific findings that respondent has a history of assaultive behavior which his doctors attribute to his mental disease, and that all of the Policy's requirements were met. See App. to Pet. for Cert. B–4 to B–5, B–8. The court found also that the medical treatment provided to respondent, including the administration of antipsychotic drugs, was at all times consistent "with the degree of care, skill, and learning expected of a reasonably prudent psychiatrist in the State of Washington, acting in the same or similar circumstances." *Id.*, at B–8. In the absence of record evidence to the contrary, we are not willing to presume that members of the staff lack the necessary independence to provide an inmate with a full and fair hearing in accordance with the Policy. In previous cases involving medical decisions implicating similar liberty interests, we have approved use of similar internal decisionmakers. See *Vitek*, 445 U. S., at 496; *Parham*, *supra*, at 613–616.[13] Cf. *Wolff*, 418 U. S., at 570–571 (prison

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[13] In an attempt to prove that internal decisionmakers lack the independence necessary to render impartial decisions, respondent and various *amici* refer us to other cases in which it is alleged that antipsychotic drugs were prescribed not for medical purposes, but to control or discipline mentally ill patients. See Brief for Respondent 28; Brief for American Psychological Association as *Amicus Curiae* 14. We rejected a similar claim in *Parham*, and do so again here, using much the same reasoning. "That such a practice may take place in some institutions in some places affords no basis for a finding as to [Washington's] program," *Parham*, 442 U. S., at 616, particularly in light of the trial court's finding here that the administration of antipsychotic drugs to respondent was consistent with good medical practice.

Moreover, the practical effect of mandating an outside decisionmaker such as an "independent psychiatrist" or judge in these circumstances may be chimerical. Review of the literature indicates that outside decisionmakers concur with the treating physician's decision to treat a patient involuntarily in most, if not all, cases. See Bloom, Faulkner, Holm, & Rawlinson, An Empirical View of Patients Exercising Their Right to Refuse Treatment, 7 Int'l J. Law & Psychiatry 315, 325 (1984) (independent examining physician used in Oregon psychiatric hospital concurred in decision to involuntarily medicate patients in 95% of cases); Hickman, Resnick, & Olson, Right to Refuse Psychotropic Medication: An Interdisciplinary Proposal, 6 Mental Disability Law Reporter 122, 130 (1982) (independent reviewing psychiatrist used in Ohio affirmed the recommendation of internal reviewer in 100% of cases). Review by judges of decisions to override a patient's objections to medication yields similar results. Appelbaum, The Right to Refuse Treatment With Antipsychotic Medications: Retrospect and Prospect, 145 Am. J. Psychiatry 413, 417–418 (1988). In comparison, other studies reveal that review by internal decisionmakers is hardly as lackluster as JUSTICE STEVENS suggests. See Hickman, Resnick, & Olson, *supra*, at 130 (internal reviewer approved of involuntary treatment in 75% of cases); Zito, Lentz, Routt, & Olson, The Treatment Review Panel: A Solution to Treatment Refusal?, 12 Bull. American Academy of Psychiatry and Law 349 (1984) (internal review panel used in Minnesota mental hospital approved of involuntary medication in 67% of cases). See generally Appelbaum & Hoge, The Right to Refuse Treatment: What the Research Reveals, 4 Behavioral Sciences and Law 279, 288–290 (1986) (summarizing results of studies on how various institutions review patients' decisions to refuse antipsychotic medications and noting "the infreofficials sufficiently impartial to conduct prison disciplinary hearings). As we reasoned in *Vitek*, it is only by permitting persons connected with the institution to make these decisions that courts are able to avoid "unnecessary intrusion into either medical or correctional judgments." *Vitek, supra,* at 496; see *Turner*, 482 U. S., at 84–85, 89.

B

The procedures established by the Center are sufficient to meet the requirements of due process in all other respects, and we reject respondent's arguments to the contrary. The Policy provides for notice, the right to be present at an adversary hearing, and the right to present and cross-examine witnesses. See *Vitek, supra,* at 494–496. The procedural protections are not vitiated by meetings between the committee members and staff before the hearing. Absent evidence of resulting bias, or evidence that the actual decision is made before the hearing, allowing respondent to contest the staff's position at the hearing satisfies the requirement that the opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo*, 380 U. S. 545, 552 (1965). We reject also respondent's contention that the hearing must be conducted in accordance with the rules of evidence or that a "clear, cogent, and convincing" standard of proof is necessary. This standard is neither required nor helpful when medical personnel are making the judgment required by the regulations here. See *Vitek, supra,* at 494–495. Cf. *Youngberg*, 457 U. S., at 321–323. Finally, we note that under state law an inmate may obtain judicial review of the hearing committee's decision by way of a personal restraint petition or petition for an extraordinary writ, and that the trial court found that the record compiled under the Policy was adequate to allow such review. See App. to Pet. for Cert. B–8.

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quency with which refusals are allowed, regardless of the system or the decisionmaker").

Respondent contends that the Policy is nonetheless deficient because it does not allow him to be represented by counsel. We disagree. "[I]t is less than crystal clear why *lawyers* must be available to identify possible errors in *medical* judgment." *Walters* v. *National Association of Radiation Survivors*, 473 U. S. 305, 330 (1985) (emphasis in original). Given the nature of the decision to be made, we conclude that the provision of an independent lay adviser who understands the psychiatric issues involved is sufficient protection. See *Vitek*, *supra*, at 499–500 (Powell, J., concurring).

V

In sum, we hold that the regulation before us is permissible under the Constitution. It is an accommodation between an inmate's liberty interest in avoiding the forced administration of antipsychotic drugs and the State's interests in providing appropriate medical treatment to reduce the danger that an inmate suffering from a serious mental disorder represents to himself or others. The Due Process Clause does require certain essential procedural protections, all of which are provided by the regulation before us. The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion. The difficult and controversial character of this case is illustrated by the simple fact that the American Psychiatric Association and the American Psychological Association, which are respected, knowledgeable, and informed professional organizations, and which are here as *amici curiae*, pull the Court in opposite directions.

I add a caveat. Much of the difficulty will be lessened if, in any appropriate case, the mentally ill patient is formally committed. This on occasion may seem to be a bother or a nuisance, but it is a move that would be protective for all concerned, the inmate, the institution, its staff, the physician, and the State itself. Cf. *Zinermon* v. *Burch, ante,* p. 113. It is a step that should not be avoided or neglected when significant indications of incompetency are present.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, concurring in part and dissenting in part.

While I join the Court's explanation of why this case is not moot, I disagree with its evaluation of the merits. The Court has undervalued respondent's liberty interest; has misread the Washington involuntary medication Policy and misapplied our decision in *Turner* v. *Safley*, 482 U. S. 78 (1987); and has concluded that a mock trial before an institutionally biased tribunal constitutes "due process of law." Each of these errors merits separate discussion.

I

The Court acknowledges that under the Fourteenth Amendment "respondent possesses a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs," *ante,* at 221, but then virtually ignores the several dimensions of that liberty. They are both physical and intellectual. Every violation of a person's bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of permanent injury and premature death.[1] Moreover, any such action is degrading if it overrides a competent person's choice to reject a specific form of medical treatment.[2] And when the purpose or effect of forced drugging is to alter the will and the mind of the subject, it constitutes a deprivation of liberty in the most literal and fundamental sense.

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[1] Cf., *e. g., Winston* v. *Lee,* 470 U. S. 753 (1985) (surgery); *Youngberg* v. *Romeo,* 457 U. S. 307 (1982) (use of physical "soft" restraints for the arms and "muffs" for hands).

[2] See *Mills* v. *Rogers,* 457 U. S. 291, 294, n. 4, 299, n. 16 (1982) (recognizing common-law battery for unauthorized touchings by a physician and assuming liberty interests are implicated by involuntary administration of psychotropic drugs); *United States* v. *Stanley,* 483 U. S. 669, 710 (1987) (O'CONNOR, J., concurring in part and dissenting in part) (the Constitution's promise of due process of law guarantees at least compensation

> "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States*, 277 U. S. 438, 478 (1928) (Brandeis, J., dissenting).

The liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values.[3]

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for violations of the principle stated by the Nuremberg Military Tribunals "that the 'voluntary consent of the human subject is absolutely essential . . . to satisfy moral, ethical and legal concepts'"); *Doe* v. *Bolton*, 410 U. S. 179, 213 (1973) (Douglas, J., concurring) (the Fourteenth Amendment protects the "freedom to care for one's health and person" (emphasis deleted)). Harper was not adjudged insane or incompetent. 110 Wash. 2d 873, 882, 759 P. 2d 358, 364 (1988).

[3] See also *Stanley* v. *Georgia*, 394 U. S. 557, 565 (1969) ("Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds").

"It is obligatory that Helsinki signatory states not manipulate the minds of their citizens; that they not step between a man and his conscience or his God; and that they not prevent his thoughts from finding expression through peaceful action. We are all painfully aware, furthermore, that governments which systematically disregard the rights of their own people are not likely to respect the rights of other nations and other people." Hearings on Abuse of Psychiatry in the Soviet Union before the Subcommittee on Human Rights and International Organizations of the House Committee on Foreign Affairs, 98th Cong., 1st Sess., 106 (1983) (Remarks by Max Kampelman, Chair of the U. S. Delegation, to the Plenary Session of the Commission on Security and Cooperation in Europe).

The record of one of Walter Harper's involuntary medication hearings at the Special Offense Center (SOC) notes: "Inmate Harper stated he would rather die th[a]n take medication."[4] That Harper would be so opposed to taking psychotropic drugs is not surprising: as the Court acknowledges, these drugs both "alter the chemical balance in a patient's brain" and can cause irreversible and fatal side effects.[5]

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[4] Lodging filed by Kenneth O. Eikenberry, Attorney General of Washington (hereinafter Lodging), Book 8, Jan. 5, 1984, Hearing (Harper testified: "Well all you want to do is medicate me and you've been medicating me. . . . Haldol paral[y]zed my right side of my body. . . . [Y]ou are burning me out of my life . . . [Y]ou are burning me out of my freedom").

The Lodging includes "books" of discovery material that the parties stipulated "could be considered by the [Trial] Court as substantive evidence and the [Trial] Court . . . considered those documents." App. to Pet. for Cert. B–1. They are hereinafter referred to by Book number and the date of the entry, where applicable. I use the Lodging not to "engage in a debate" over the assessment of Harper's treatment, *ante*, at 228, n. 11, but simply to illustrate the boundaries of Policy 600.30 in operation.

[5] *Ante*, at 229. The Court relies heavily on the Brief for American Psychiatric Association et al. as *Amici Curiae* (Psychiatrists' Brief), see *ante*, at 214, 226, and n. 9, 227, and n. 10, 230, to discount the severity of these drugs. However, medical findings discussed in other briefs support the conclusions of the Washington Supreme Court and challenge the reliability of the Psychiatrists' Brief. For example, the Brief for American Psychological Association as *Amicus Curiae* (Psychologists' Brief) points out that the observation of tardive dyskinesia has been increasing "at an alarming rate" since the 1950–1970 data relied on by the Psychiatrists' Brief 14–16, and that "the chance of suffering this potentially devastating disorder is greater than one in four." Psychologists' Brief 8. See also Brief for Coalition for Fundamental Rights and Equality of Ex-Patients as *Amicus Curiae* 16–18 (court findings and recent literature on side effects); Brief for National Association of Protection and Advocacy Systems et al. as *Amici Curiae* 7–16 (same). Psychiatrists also may not be entirely disinterested experts. The psychologists charge: "As a psychiatrist has written, '[l]itigation from patients suffering from TD [tardive dyskinesia] is expected to explode within the next five years. Some psychiatrists and other physicians continue to minimize the seriousness of TD . . . [despite] continual warnings.'" Psychologists' Brief 4 (quoting R. Simon, Clinical Psychiatry and the Law 74 (1987)).

The prolixin injections that Harper was receiving at the time of his statement exemplify the intrusiveness of psychotropic drugs on a person's body and mind. Prolixin acts "at all levels of the central nervous system as well as on multiple organ systems."[6] It can induce catatonic-like states, alter electroencephalographic tracings, and cause swelling of the brain. Adverse reactions include drowsiness, excitement, restlessness, bizarre dreams, hypertension, nausea, vomiting, loss of appetite, salivation, dry mouth, perspiration, headache, constipation, blurred vision, impotency, eczema, jaundice, tremors, and muscle spasms. As with all psychotropic drugs, prolixin may cause tardive dyskinesia, an often irreversible syndrome of uncontrollable movements that can prevent a person from exercising basic functions such as driving an automobile, and neuroleptic malignant syndrome, which is 30% fatal for those who suffer from it.[7] The risk of side effects increases over time.[8]

The Washington Supreme Court properly equated the intrusiveness of this mind-altering drug treatment with electroconvulsive therapy or psychosurgery. It agreed with the Supreme Judicial Court of Massachusetts' determination that the drugs have a "'profound effect'" on a person's "'thought processes'" and a "'well-established likelihood of severe and irreversible adverse side effects,'" and that they therefore should be treated "'in the same manner we would treat psychosurgery or electroconvulsive therapy.'" 110 Wash. 2d 873, 878, 759 P. 2d 358, 362 (1988) (quoting *In re Guardianship of Roe,* 383 Mass. 415, 436–437, 421 N. E. 2d 40, 53 (1981)). There is no doubt, as the State Supreme Court and other courts that have analyzed the issue have concluded, that a competent individual's right to refuse such medication is a fundamental liberty interest deserving the highest order of protection.[9]

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[6] Physician's Desk Reference 1639 (43d ed. 1989).

[7] *Id.*, at 1640; Trial Court Finding 9, App. to Pet. for Cert. B–7 to B–8; Guzé & Baxter, Neuroleptic Malignant Syndrome, 313 New England J. Med. 163, 163–164 (1985).

[8] Physician's Desk Reference, *supra*, at 1639. Harper voluntarily took psychotropic drugs for six years before involuntary medication began in 1982, by which time he had already exhibited dystonia (acute muscle spasms) and akathesia (physical-emotional agitation). *E. g.*, Lodging, Book 2, May 28, 1982, Aug. 4, 1982; see also Trial Court Findings 9–10, App. to Pet. for Cert. B–7 to B–8. Although avoidance of akathesia and the risk of tardive dyskinesia require reduction or discontinuance of psychotropics, *ibid.*, Harper's involuntary medication was continuous from November 1982 to June 1986, except for one month spent at Washington State Reformatory. Lodging, Book 8; Trial Court Findings 4–6, 9, App. to Pet. for Cert. B–4 to B–8.

II

Arguably, any of three quite different state interests might be advanced to justify a deprivation of this liberty interest. The State might seek to compel Harper to submit to a mind-altering drug treatment program as punishment for the crime he committed in 1976, as a "cure" for his mental illness, or as a mechanism to maintain order in the prison. The Court today recognizes Harper's liberty interest only as against the first justification.

Forced administration of antipsychotic medication may not be used as a form of punishment. This conclusion follows inexorably from our holding in *Vitek* v. *Jones,* 445 U. S. 480 (1980), that the Constitution provides a convicted felon the protection of due process against an involuntary transfer from the prison population to a mental hospital for psychiatric treatment. We explained:

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[9] 110 Wash. 2d, at 878, 759 P. 2d, at 362. See, *e. g., Large* v. *Superior Court,* 148 Ariz. 229, 714 P. 2d 399 (1986) (en banc); *Riese* v. *St. Mary's Hospital and Medical Center,* 209 Cal. App. 3d 1303, 243 Cal. Rptr. 241 (1st Dist. 1988), review granted but dism'd, 774 P. 2d 698 (1989); *People* v. *Medina,* 705 P. 2d 961 (Colo. 1985) (en banc); *Rogers* v. *Commissioner of Dept. of Mental Health,* 390 Mass. 489, 458 N. E. 2d 308 (1983); *Rivers* v. *Katz,* 67 N. Y. 2d 485, 495 N. E. 2d 337 (1986); *In re Mental Health of K. K. B.,* 609 P. 2d 747 (Okla. 1980). Cf. *In re Schuoler,* 106 Wash. 2d 500, 723 P. 2d 1103 (1986) (right to refuse electroconvulsive therapy).

> "Appellants maintain that the transfer of a prisoner to a mental hospital is within the range of confinement justified by imposition of a prison sentence, at least after certification by a qualified person that a prisoner suffers from a mental disease or defect. We cannot agree. None of our decisions holds that conviction for a crime entitles a State not only to confine the convicted person but also to determine that he has a mental illness and to subject him involuntarily to institutional care in a mental hospital. Such consequences visited on the prisoner are qualitatively different from the punishment characteristically suffered by a person convicted of crime. Our cases recognize as much and reflect an understanding that involuntary commitment to a mental hospital is not within the range of conditions of confinement to which a prison sentence subjects an individual. *Baxstrom* v. *Herold*, 383 U. S. 107 (1966); *Specht* v. *Patterson*, 386 U. S. 605 (1967); *Humphrey* v. *Cady*, 405 U. S. 504 (1972); *Jackson* v. *Indiana*, 406 U. S. 715, 724–725 (1972). A criminal conviction and sentence of imprisonment extinguish an individual's right to freedom from confinement for the term of his sentence, but they do not authorize the State to classify him as mentally ill and to subject him to involuntary psychiatric treatment without affording him additional due process protections." *Id.*, at 493–494.

The Court does not suggest that psychotropic drugs, any more than transfer for medical treatment, may be forced on prisoners as a necesssary condition of their incarceration or as a disciplinary measure. Rather, it holds:

> "[G]iven the requirements of the prison environment, the Due Process Clause permits the State to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will, if the inmate is dangerous to himself or others *and the treatment is in the inmate's medical interest.* Policy 600.30 comports with

> these requirements; we therefore reject respondent's contention that its substantive standards are deficient under the Constitution." *Ante*, at 227 (emphasis added).

Crucial to the Court's exposition of this substantive due process standard is the condition that these drugs "may be administered for no purpose other than treatment," and that "the treatment in question will be ordered only if it is in the prisoner's medical interests, given the legitimate needs of his institutional confinement." *Ante*, at 226, 222. Thus, although the Court does not find, as Harper urges, an absolute liberty interest of a competent person to refuse psychotropic drugs, it does recognize that the substantive protections of the Due Process Clause limit the forced administration of psychotropic drugs to all but those inmates whose medical interests would be advanced by such treatment.

Under this standard the Court upholds SOC Policy 600.30, determining that this administrative scheme confers, as a matter of state law, a substantive liberty interest coextensive with that conferred by the Due Process Clause. *Ante*, at 221–222, 227. Whether or not the State's alleged interest in providing medically beneficial treatment to those in its custody who are mentally ill may alone override the refusal of psychotropic drugs by a presumptively competent person, a plain reading of Policy 600.30 reveals that it does not meet the substantive standard set forth by the Court. Even on the Court's terms, the Policy is constitutionally insufficient.

Policy 600.30 permits forced administration of psychotropic drugs on a mentally ill inmate based purely on the impact that his disorder has on the security of the prison environment. The provisions of the Policy make no reference to any expected benefit to the inmate's medical condition. Policy 600.30 requires:

> "In order for involuntary medication to be approved, it must be demonstrated that the inmate suffers from a mental disorder and as a result of that disorder constitutes a likelihood of serious harm to himself or others

> and/or is gravely disabled." Lodging, Book 9, Policy 600.30, p. 1.

"Likelihood of serious harm," according to the Policy,

> "means either (i) A substantial risk that physical harm will be inflicted by an individual upon his own person, as evidenced by threats or attempts to commit suicide or inflict physical harm on one's self, (ii) a substantial risk that physical harm will be inflicted by an individual upon another as evidenced by behavior which has caused such harm or which places another person or persons in reasonable fear of sustaining such harm, or (iii) a substantial risk that physical harm will be inflicted by an individual upon the property of others as evidenced by behavior which has caused substantial loss or damage to the property of others."[10]

Thus, the Policy authorizes long-term involuntary medication not only of any mentally ill inmate who, as a result of a mental disorder, appears to present a future risk to himself, but also of an inmate who presents a future risk to other people or mere property.

Although any application of Policy 600.30 requires a medical judgment as to a prisoner's mental condition and the cause of his behavior, the Policy does not require a determination that forced medication would advance his medical interest.[11] Use of psychotropic drugs, the State readily admits, serves to ease the institutional and administrative burdens of maintaining prison security and provides a means of managing an unruly prison population and preventing property damage.[12] By focusing on the risk that the inmate's mental condition poses to other people and property, the Policy allows the State to exercise either *parens patriae* authority or police authority to override a prisoner's liberty interest in refusing psychotropic drugs. Thus, most unfortunately, there is simply no basis for the Court's assertion that medication under the Policy must be to advance the prisoner's medical interest.[13]

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[10] Lodging, Book 9, Policy 600.30, p. 1. Revised Policy 620.200, effective February 18, 1985, retained these substantive definitions. Lodging, Book 9, Policy 620.200, p. 1.

[11] The Court's reliance on the Hippocratic Oath to save the constitutionality of Policy 600.30 is unavailing. *Ante*, at 223, n. 8. Whether or not the Oath binds treating physicians with a "medical interest" requirement in prescribing medications, it has no bearing on the SOC review committees, which are governed solely by the administrative criteria of Policy 600.30 in authorizing involuntary medication. Nor can the Court possibly believe that any "treatment" is talismanically in a patient's "medical interest." Treatment of a condition with medication facilitates a specific physiological result, which may or may not be in the overall medical interest of the patient. For example, the patient's medical interest in reducing his own vio-

Policy 600.30 sweepingly sacrifices the inmate's substantive liberty interest to refuse psychotropic drugs, regardless of his medical interests, to institutional and administrative

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lence or in altering his mental condition may be often outweighed by the risk or onset of severe medical side effects. See *supra*, at 239–241. Finally, the qualitative judgment of what is a patient's best interest cannot be made without reference to his own preferences. The Policy does not account for either a physician's determination of medical interest or the inmate's wishes.

[12] See, *e. g.*, Brief for Petitioners 29 ("Harper's history of assaultive behavior requires that the state exercise its police power to appropriately medicate him for the protection of others"); *id.*, at 17 ("The policy assists prison administrators in meeting their 'unquestioned duty to provide reasonable safety for all residents and personnel within the institution'"). See also Brief for United States as *Amicus Curiae* 17 ("The paramount concerns in running a prison or a prison mental health facility are maintaining institutional security, preserving internal order, and establishing a therapeutic environment. . . . [I]t goes without saying that the interest in preventing violence and maintaining order is significantly amplified when an entire ward consists of mentally ill prisoners, as at the SOC").

[13] The trial court did not attempt to separate the medical and institutional objectives of Policy 600.30. Nor did it construe the Policy's terms to require that an inmate's best medical interests be served by medication. The trial court's findings were limited to Harper's case. Findings 11–12, App. to Pet. for Cert. B–8. They shed no light on whether Harper's doctors did—or "a reasonably prudent psychiatrist in the State of Washington, acting in the same or similar circumstances" as a SOC psychiatrist could—order medication for any combination of therapeutic or institutional concerns. Finding 12, App. to Pet. for Cert. B–8.

concerns. The State clearly has a legitimate interest in prison security and administrative convenience that encompasses responding to potential risks to persons and property. However, to the extent that the Court recognizes "both the prisoner's medical interests and the State's interests" as potentially *independent* justifications for involuntary medication of inmates,[14] it seriously misapplies the standard announced in *Turner* v. *Safley*, 482 U. S. 78 (1987). In *Turner*, we held that a prison regulation that impinges on inmates' constitutional rights is valid "if it is reasonably related to legitimate penological interests." *Id.*, at 89. Under this test, we determined that a regulation barring inmate-to-inmate correspondence was adequately supported by the State's institutional security concerns. *Id.*, at 93. We also unanimously concluded that a regulation prohibiting inmate marriage, except with consent of the prison superintendent made upon proof of compelling circumstances, was an "exaggerated response" to the prison's claimed security objectives and was not reasonably related to its articulated rehabilitation goal. *Id.*, at 97–98.

The State advances security concerns as a justification for forced medication in two distinct circumstances. A SOC Policy provision not at issue in this case permits 72 hours of involuntary medication on an emergency basis when "an inmate is suffering from a mental disorder and as a result of that disorder presents an *imminent* likelihood of *serious harm* to himself or others." Lodging, Book 9, Policy 600.30, p. 2 (emphasis added). In contrast to the imminent danger of injury that triggers the emergency medication provisions, a general risk of illness-induced injury or property damage—evidenced by no more than past behavior—allows long-term, involuntary medication of an inmate with psychotropic drugs under Policy 600.30. This ongoing interest in security and management is a penological concern of a constitutionally distinct magnitude from the necessity of responding to emergencies. See *Whitley* v. *Albers*, 475 U. S. 312, 321–322 (1986). It is difficult to imagine what, if any, limits would restrain such a general concern of prison administrators who believe that prison environments are, "'by definition,' . . . made up of persons with 'a demonstrated proclivity for antisocial criminal, and often violent, conduct.'" *Ante*, at 225 (quoting *Hudson* v. *Palmer*, 468 U. S. 517, 526 (1984)). A rule that allows prison administrators to address potential security risks by forcing psychotropic drugs on mentally ill inmates for prolonged periods is unquestionably an "exaggerated response" to that concern.

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[14] *Ante*, at 223. The Court further conflates its analysis by suggesting that "[t]he State has undertaken the obligation to provide prisoners with medical treatment consistent not only with their own medical interests, but also with the needs of the institution." *Ante*, at 225.

In *Turner* we concluded on the record before us that the marriage "regulation, as written, [was] not reasonably related to . . . penological interests," and that there were "obvious, easy alternatives" that the State failed to rebut by reference to the record. 482 U. S., at 97–98. Today the Court concludes that alternatives to psychotropic drugs would impose more than *de minimis* costs on the State. However, the record before us does not establish that a more narrowly drawn policy withdrawing psychotropics from only those inmates who actually refuse consent[15] and who do not pose an imminent threat of serious harm[16] would increase the marginal costs of SOC administration. Harper's own record reveals that administrative segregation and standard disciplinary sanctions were frequently imposed on him over and above forced medication and thus would add no new costs. Lodging, Book 1. Similarly, intramuscular injections of psychotropics, such as those frequently forced on Harper, *id.*, Book 7, entail no greater risk than administration of less dangerous drugs such as tranquilizers.[17] Use of psychotropic drugs simply to suppress an inmate's potential violence, rather than to achieve therapeutic results, may also undermine the efficacy of other available treatment programs that would better address his illness.[18]

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[15] There is no evidence that more than a small fraction of inmates would refuse drugs under a voluntary policy. Harper himself voluntarily took psychotropics for six years, and intermittently consented to them after 1982. Lodging, Books 2 and 8. See, *e. g.*, *Rogers* v. *Okin*, 478 F. Supp. 1342, 1369 (Mass. 1979) (only 12 of 1,000 institutionalized patients refused psychotropic drugs for prolonged periods during the two years that judicial restraining order was in effect), modified, 634 F. 2d 650 (CA1 1980), vacated and remanded *sub nom. Mills* v. *Rogers*, 457 U. S. 291 (1982). The efficacy of forced drugging is also marginal; involuntary patients have a poorer prognosis than cooperative patients. See Rogers & Webster, Assessing Treatability in Mentally Disordered Offenders, 13 Law and Human Behavior 19, 20–21 (1989).

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[16] As the Court notes, properly used, these drugs are "one of the most effective means of treating and controlling" certain incurable mental illnesses, *ante*, at 226, but they are not a panacea for long-term care of all patients.

"[T]he maintenance treatment literature . . . shows that many patients (approximately 30%) relapse despite receiving neuroleptic medication, while neuroleptics can be withdrawn from other patients for many months and in some cases for years without relapse. Standard maintenance medication treatment strategies, though they are indisputably effective in group comparisons, may be quite inefficient in addressing the treatment requirements of the individual patient." Lieberman et al., Reply to Ethics of Drug Discontinuation Studies in Schizophrenia, 46 Archives of General Psychiatry 387 (1989) (footnotes omitted).

Indeed, the drugs appear to have produced at most minor "savings" in Harper's case. Dr. Petrich reported that "medications are not satisfactory in containing the worst excesses of his labile and irritable behavior. He is uncooperative when on medication," Lodging, Book 2, Nov. 10, 1982, and a therapy supervisor reported before Harper's involuntary medication began:

"[D]uring the time in which he assaulted the nurse at Cabrini he was on neuroleptic medication yet there is indication that he was psychotic. However, during his stay at SOC he has been off of all neuroleptic medications and at times has shown some preoccupation and appearance of psychosis but has not become assaultive. His problems on medication, such as the paradoxical effect from the neuroleptic medications, may be precipitated by increased doses of neuroleptic medications and may cause an exacerbation of his psychosis. Though Mr. Harper is focused on psychosomatic problems from neuroleptic medications as per the side effects, the real problem may be that the psychosis is exacerbated by neuroleptic medications." *Id.*, Book 3, May 6, 1982, p. 6.

[17] Because most psychotropic drugs do induce lethargy, drowsiness, and fatigue, *e. g.*, Physician's Desk Reference 1126, 1236, 1640, 1755, 1788,

The Court's careful differentiation in *Turner* between the State's articulated goals of security and rehabilitation should be emulated in this case. The flaw in Washington's Policy 600.30—and the basic error in the Court's opinion today—is the failure to divorce from each other the two justifications for forced medication and to consider the extent to which the Policy is reasonably related to either interest. The State, and arguably the Court, allows the SOC to blend the state interests in responding to emergencies and in convenient prison administration with the individual's interest in receiving beneficial medical treatment. The result is a muddled rationale that allows the "exaggerated response" of forced psychotropic medication on the basis of purely institutional concerns. So serving institutional convenience eviscerates

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1883 (43d ed. 1989), this form of "medical treatment" may reduce an inmate's dangerousness, not by improving his mental condition, but simply by sedating him with a medication that is grossly excessive for that purpose.

[18] For example, although psychotropic drugs were of mixed value in treating Harper's condition, *supra*, at 248, n. 16, they became the primary means of dealing with him. *E. g.*, Lodging, Book 8, Nov. 7, 1984, Hearing (Dr. Petrich reports: "The patient is still not able to negotiate with the treatment staff or work collectively with them. We have no idea as to the extent of his psychosis nor do we have any working relationship upon which to build internal and external controls"); *id.*, Book 8, Feb. 26, 1985 (Dr. Loeken reports: "because of his lack of participation in therapy it is recommended that the involuntary medication policy continue in use").

Forcing psychotropics on Harper also provoked counterproductive behavior. *E. g.*, *id.*, Book 8, Dec. 16, 1982 (Report of Dr. Petrich that Harper's assault on a male nurse and damage to a television were "in the context of his complaining about medication side effects. Overall the issue of involuntary medications and side effects is a major issue in his management"); *id.*, Book 8, Oct. 7, 1983 (therapist's report that Harper has indicated "that he is going to destroy unit property until the medications are stopped. He has recently destroyed the inmates['] stereo as an example of this").

the inmate's substantive liberty interest in the integrity of his body and mind.[19]

III

The procedures of Policy 600.30 are also constitutionally deficient. Whether or not the State ever may order involuntary administration of psychotropic drugs to a mentally ill person who has been committed to its custody but has not been declared incompetent, it is at least clear that any decision approving such drugs must be made by an impartial professional concerned not with institutional interests, but only with the individual's best interests. The critical defect in Policy 600.30 is the failure to have the treatment decision made or reviewed by an impartial person or tribunal. See *Vitek*, 445 U. S., at 495.[20]

The psychiatrists who diagnose and provide routine care to SOC inmates may prescribe psychotropic drugs and recommend involuntary medication under Policy 600.30. The Policy provides that a nonemergency decision to medicate for up to seven consecutive days must be approved by a special committee after a hearing. The committee consists of the Associate Superintendent of SOC, a psychologist, and a psychiatrist. Neither of the medical professionals may be involved in the current diagnosis or treatment of the inmate. The approval of the psychiatrist and one other committee member is required to sustain a 7-day involuntary medication decision. Lodging, Book 9, Policy 600.30, p. 2, § 3.B. A similarly composed committee is required to authorize "long term" involuntary medication lasting over seven days. Policy 600.30 does not bar current treating professionals or previous committee members from serving on the long-term committee. This committee does *not* conduct a new hearing, but merely reviews the inmate's file and minutes of the 7-day hearing. Long-term approval, if granted, allows medication to continue indefinitely with a review and report by the treating psychiatrist every 14 days. *Id.*, Book 9, Policy 600.30, p. 2, § 3.C.[21]

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[19] *Youngberg* v. *Romeo*, 457 U. S. 307 (1982), and *Parham* v. *J. R.*, 442 U. S. 584 (1979), are inapposite. Neither involved care of a presumptively competent individual; Romeo, a profoundly retarded adult with the mental capacity of an 18-month-old child, had been committed by the court to a state hospital for treatment, 457 U. S., at 309, and J. R. and appellees were children, 442 U. S., at 587. In addition, the deprivations of liberty at issue in both cases—use of physical restraints in *Youngberg* and institutionalization in *Parham*—fall far short of Harper's interest in refusing mind-altering drugs with potentially permanent and fatal side effects. Cf. *Bee* v. *Greaves*, 744 F. 2d 1387, 1395–1397 (CA10 1984) (forcible medication with psychotropics is not reasonably related to prison security), cert. denied, 469 U. S. 1214 (1985).

[20] It is not necessary to reach the question whether the decision to force psychotropic drugs on a competent person against his will must be approved by a judge, or by an administrative tribunal of professionals who are not members of the prison staff, in order to conclude that the mechanism of Policy 600.30 violates procedural due process. The choice is not between medical experts on the one hand and judges on the other; the choice is between decisionmakers who are biased and those who are not.

These decisionmakers have two disqualifying conflicts of interest. First, the panel members must review the work of treating physicians who are their colleagues and who, in turn, regularly review their decisions. Such an in-house system pits the interests of an inmate who objects to forced medication against the judgment not only of his doctor, but often his doctor's colleagues.[22] Furthermore, the Court's

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[21] Revised Policy 620.200 authorizes up to 14 consecutive days of involuntary medication before long-term committee approval is required, and adds a committee hearing to review continuing involuntary medication every 180 days thereafter. It also bars current treating personnel from sitting on the long-term committee. Lodging, Book 9, Policy 620.200, pp. 3–4.

[22] As regular SOC staff, 600.30 committee members are

"susceptible to implicit or explicit pressure for cooperation ('If you support my orders, I'll support yours'). It is instructive that month after month, year after year, this 'review' panel *always* voted for more medication—despite the scientific literature showing that periodic respites from drugs are advisable and that prolonged use of antipsychotic drugs is proper only

Second, the panel members, as regular staff of the Center, must be concerned not only with the inmate's best medical interests, but also with the most convenient means of controlling the mentally disturbed inmate. The mere fact that a decision is made by a doctor does not make it "certain that professional judgment in fact was exercised." *Youngberg* v. *Romeo*, 457 U. S. 307, 321 (1982). The structure of the SOC committee virtually ensures that it will not be. While the initial inquiry into the mental bases for an inmate's behavior is medical, the ultimate medication decision under Policy 600.30 turns on an assessment of the risk that an inmate's condition imposes on the institution. The prescribing physician and each member of the review committee must therefore wear two hats. This hybrid function disables the independent exercise of each decisionmaker's *professional* judgment.[24] The conclusion that "[n]one of the hearing committee members may be involved in the inmate's current treatment or diagnosis," *ante*, at 233, overlooks the fact that Policy 600.30 allows a treating psychiatrist to participate in all but the initial *7-day* medication approval. This revolving door operated in Harper's case. Dr. Petrich treated Harper through 1982 and recommended involuntary medication on October 27, 1982. Lodging, Book 8, Oct. 27, 1982. Dr. Loeken, staff psychologist Giles, and Assistant Superintendent Stark authorized medication for seven days after a 600.30 hearing on November 23, 1982. Dr. Petrich then replaced Dr. Loeken on the committee, and with Giles and Stark approved long-term involuntary medication on December 8, 1982. Solely under this authority, Dr. Petrich prescribed more psychotropic medication for Harper on December 8, 1982, and throughout the following year.[23]

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[24] The Court cites *Vitek* v. *Jones*, 445 U. S. 480 (1980), and *Parham* as "previous cases involving medical decisions implicating similar liberty interests [in which] we have approved use of similar internal decisionmakers." *Ante*, at 233–234. Aside from the greater liberty interest implicated by forced psychotropic medication, SOC decisionmakers face different demands than their professional counterparts in *Vitek* and *Parham*. In *Vitek*, the Nebraska state transfer policy at issue affected only prisoners determined to be mentally ill who could not "adequately be treated within the penal complex." 445 U. S., at 489. We found that the determination of the necessity of transfer for treatment, "a question that is essentially medical," could be made fairly by professionals after a meaningful hearing. *Id.*, at 495. Similarly, we understood the civil commitment decision at issue in *Parham* to involve examination of the child, review of medical records, and a diagnosis and determination of "whether the child will likely benefit from institutionalized care," emphasizing that "[w]hat is best for a child is an individual medical decision . . . of what the child requires." 442 U. S., at 614–615, 608. Both of these procedures sought to reach an accurate medical determination of the patient's treatment needs without reference to the institution's separate interests. We concluded that, despite their positions inside the Nebraska prison and Georgia hospital, these medical professionals were capable of exercising the independence of professional judgment required by due process. None of the medical professionals at the SOC, charged with making medication decisions in light

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when the medical need is clear and compelling." Psychologists' Brief 26–27 (footnote omitted).

Rates of approval by different review bodies are of limited value, of course, because institutions will presumably adjust their medication practices over time to obtain approval under different standards or by different reviewing bodies. However, New Jersey's review of involuntary psychotropic medication in mental institutions is instructive. In 1980 external review by an "independent psychiatrist" who was not otherwise employed by the Department of Human Services resulted in discontinuation or reduction of 59% of dosages. After the Department moved to an internal peer review system, that percentage dropped to 2.5% of cases. Brief for New Jersey Department of Public Advocate as *Amicus Curiae* 38–54.

[23] All of Harper's prescription entries from November 20, 1982, through December 8, 1982, were made "per Dr. Petrich." Lodging, Book 7, primary encounter reports of Nov. 20, 1982, Dec. 2, 1982, Dec. 8, 1982. After Harper's return to the SOC in December 1983, Dr. Loeken became his primary physician, and committees again approved 7-day, then long-term, involuntary medication. Although Dr. Petrich was not on these committees, he sat on the next three 180-day review committees, voting to authorize forced medication through January 1986. Trial Court Finding 7, App. to Pet. for Cert. B–7.

structure of the review committee further confuses the objective of the inquiry; two of the committee members are not trained or licensed to prescribe psychotropic drugs, and one has no medical expertise at all. The trump by institutional interests is dramatized by the fact that appeals of committee decisions under the Policy are made solely to the SOC Superintendent.[25]

The Court asserts that "[t]here is no indication that any institutional biases affected or altered the decision to medicate respondent against his will" and that there is no evidence that "antipsychotic drugs were prescribed not for medical purposes, but to control or discipline mentally ill patients." *Ante*, at 233, and 234, n. 13. A finding of bias in an individual case is unnecessary to determine that the structure of Policy 600.30 fails to meet the due process requirements of the Fourteenth Amendment. In addition, Harper's own record illustrates the potential abuse of psychotropics under Policy 600.30 for institutional ends. For example, Dr. Petrich added Taractan, a psychotropic drug, to Harper's medication around October 27, 1982, noting: "The goal of the increased medication to sedate him at night and relieve the residents and evening *[sic]* alike of the burden of supervising him as intensely."[26] A 1983 examination by non-SOC physicians

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of the inmate's impact on the institution and its needs, can claim such independence.

[25] Lodging, Book 9, Policy 600.30, p. 4. The Court notes that an inmate may bring a personal restraint petition or seek an extraordinary writ under Wash. Rules App. Proc. 16.3 to 16.17, *ante*, at 216, 235. However, a nonemergency involuntary medication decision demands—as the existence of a SOC Policy attests—meaningful administrative review of this deprivation of liberty, not merely the existence of collateral judicial mechanisms. Cf. *Ingraham* v. *Wright*, 430 U. S. 651 (1977).

[26] Lodging, Book 8, Oct. 27, 1982. Indeed, a "psychiatric security attendant," not a doctor, made the first recorded request for involuntary medication after Harper attempted to pull the guard's hand through a food slot. The guard filed a disciplinary "Infraction Report" which concluded: "Sug-

also indicated that Harper was prophylactically medicated absent symptoms that would qualify him for involuntary medication.[27]

The institutional bias that is inherent in the identity of the decisionmakers is unchecked by other aspects of Policy 600.30. The committee need not consider whether less intrusive procedures would be effective, or even if the prescribed medication would be beneficial to the prisoner, before approving involuntary medication. Findings regarding the severity or the probability of potential side effects of drugs and dosages are not required. And, although the Policy does not prescribe a standard of proof necessary for any factual determination upon which a medication decision rests, the Court gratuitously advises that the "clear, cogent, and convincing" standard adopted by the State Supreme Court would be unnecessary.[28]

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gestion: This inmate is in need of involuntary medication. He is a threat to the safety + security of the institution." *Id.*, Book 1–2, Oct. 22, 1982. Five days later, Dr. Petrich, citing the incident, recommended involuntary medication. *Id.*, Book 8, Oct. 27, 1982.

[27] Harper was transferred on November 16, 1983, to Washington State Reformatory, where a psychiatrist on its Multidisciplinary Advisory Committee found:

"To this date, he has not exhibited behavior in the presence of any committee members or custody staff that would qualify him under involuntary medication policy. He does have a long history of recurrent difficulty and as best as we can tell SOC instituted the involuntary policy and *continued it on the basis of past bad faith;* however, we do not have any of that data available to us." *Id.*, Book 3, Nov. 30, 1983 (emphasis added).

See also *id.*, Book 8, May 1, 1985, Hearing ("[T]he inmate[']s behavior during the committee hearing did not meet the criteria for gravely disabled or self injurious behavior. Involuntary medication is continued on the basis of potential violent behavior towards others which has been well documented in the inmate's history").

[28] *Ante*, at 235. In *Addington* v. *Texas*, 441 U. S. 418 (1979), we held that the medical conditions for civil commitment must be proved by clear and convincing evidence. The purpose of this standard of proof, to reduce

Nor is the 600.30 hearing likely to raise these issues fairly and completely. An inmate recommended for involuntary medication is no more capable of "'speaking effectively for himself'" on these "issues which are 'complex or otherwise difficult to develop or present'" than an inmate recommended for transfer to a mental hospital. *Vitek*, 445 U. S., at 498 (Powell, J., concurring in part). Although single doses of some psychotropic drugs are designed to be effective for a full month, the inmate may not refuse the very medication he is contesting until 24 hours before his hearing.[29] Policy 600.30 also does not allow the inmate to be represented by counsel at hearings, but only to have present an adviser, who is appointed by the SOC. Lodging, Book 9, Policy 600.30, pp. 3–4. These advisers, of questionable loyalties and efficacy, cannot provide the "independent assistance" required for an inmate fairly to understand and participate in the hearing process. 445 U. S., at 498.[30] In addition, although the Policy gives the inmate a "limitable right to present testimony through his own witnesses and to confront and cross-examine witnesses," in the next paragraph it takes that right away for reasons that "include, but are not limited to such

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the chances of inappropriate decisions, *id.*, at 427, is no less meaningful when the factfinders are professionals as when they are judges or jurors.

[29] Lodging, Book 9, Policy 600.30, p. 2. Prolixin decanoate, for example, is "a highly potent behavior modifier with a markedly extended duration of effect"; onset is between 24 to 72 hours after injection and effects can last 4–6 weeks. Physician's Desk Reference 1641–1642 (43d ed. 1989).

[30] The prisoner is introduced to, and may consult with, his appointed adviser at the commencement of the hearing. Harper's adviser on November 23, 1982, a nurse practitioner from Washington State Reformatory, asked Harper three questions in the hearing. Lodging, Book 8, Nov. 23, 1982, Hearing. The other five advisers appointed for Harper never spoke in the hearings. All five were apparently staff at the SOC: SOC Psychiatric Social Worker Hyden (who sat for the SOC Assistant Superintendent on the next 180-day committee that reapproved Harper's medication), a prison chaplain, two registered nurses, and a correctional officer. *Id.*, Book 8, Dec. 8, 1982, Dec. 30, 1983, Jan. 5, 1984, Oct. 31, 1984, and Nov. 7, 1984, Hearings.

things as irrelevance, lack of necessity, redundancy, possible reprisals, or other reasons relating to institutional interests of security, order, and rehabilitation." Lodging, Book 9, Policy 600.30, p. 3. Finally, because Policy 600.30 provides a hearing only for the 7-day committee, and just a paper record for the long-term committee, the inmate has no opportunity at all to present his objections to the more crucial decision to medicate him on a long-term basis.

In sum, it is difficult to imagine how a committee convened under Policy 660.30 could conceivably discover, much less be persuaded to overrule, an erroneous or arbitrary decision to medicate or to maintain a specific dosage or type of drug. See *Mathews* v. *Eldridge*, 424 U. S. 319, 335 (1976). Institutional control infects the decisionmakers and the entire procedure. The state courts that have reviewed comparable procedures have uniformly concluded that they do not adequately protect the significant liberty interest implicated by the forced administration of psychotropic drugs.[31] I agree with that conclusion. Although a review procedure administered by impartial, nonjudicial professionals might avoid the constitutional deficiencies in Policy 600.30, I would affirm the decision of the Washington Supreme Court requiring a judicial hearing, with its attendant procedural safeguards, as a remedy in this case.

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[31] Many States require a judicial determination of incompetence, other findings, or a substituted judgment when a patient or inmate refuses psychotropic drugs. *E. g.*, *Riese* v. *St. Mary's Hospital and Medical Center*, 209 Cal. App. 3d 1303, 243 Cal. Rptr. 241 (1st Dist. 1988), review granted but dism'd, 774 P. 2d 698 (1989); *People* v. *Medina*, 705 P. 2d 961 (Colo. 1985) (en banc); *In re Boyd*, 403 A. 2d 744 (D. C. 1979); *In re Mental Commitment of M. P.*, 510 N. E. 2d 645 (Ind. 1987); *Rogers* v. *Commissioner of Dept. of Mental Health*, 390 Mass. 489, 458 N. E. 2d 308 (1983); *Jarvis* v. *Levine*, 418 N. W. 2d 139 (Minn. 1988); *Opinion of the Justices*, 123 N. H. 554, 465 A. 2d 484 (1983); *Rivers* v. *Katz*, 67 N. Y. 2d 485, 495 N. E. 2d 337 (1986); *In re Mental Health of K. K. B.*, 609 P. 2d 747 (Okla. 1980); *State ex rel. Jones* v. *Gerhardstein*, 141 Wis. 2d 710, 416 N. W. 2d 883 (1987).

I continue to believe that "even the inmate retains an unalienable interest in liberty—at the very minimum the right to be treated with dignity—which the Constitution may never ignore." *Meachum* v. *Fano*, 427 U. S. 215, 233 (1976) (dissenting opinion). A competent individual's right to refuse psychotropic medication is an aspect of liberty requiring the highest order of protection under the Fourteenth Amendment.[32] Accordingly, with the exception of Part II, I respectfully dissent from the Court's opinion and judgment.

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[32] Only Harper's due process claim is before the Court. *Ante*, at 218, n. 5. His First Amendment, equal protection, state constitutional, and common-law tort claims have not yet been considered by the Washington state courts.

UNITED STATES *v.* VERDUGO-URQUIDEZ

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-1353. Argued November 7, 1989—Decided February 28, 1990

After the Government obtained an arrest warrant for respondent—a Mexican citizen and resident believed to be a leader of an organization that smuggles narcotics into this country—he was apprehended by Mexican police and transported here, where he was arrested. Following his arrest, Drug Enforcement Administration (DEA) agents, working with Mexican officials, searched his Mexican residences and seized certain documents. The District Court granted his motion to suppress the evidence, concluding that the Fourth Amendment—which protects "the people" against unreasonable searches and seizures—applied to the searches, and that the DEA agents had failed to justify searching the premises without a warrant. The Court of Appeals affirmed. Citing *Reid* v. *Covert*, 354 U. S. 1—which held that American citizens tried abroad by United States military officials were entitled to Fifth and Sixth Amendment protections—the court concluded that the Constitution imposes substantive constraints on the Federal Government, even when it operates abroad. Relying on *INS* v. *Lopez-Mendoza*, 468 U. S. 1032—where a majority assumed that illegal aliens in the United States have Fourth Amendment rights—the court observed that it would be odd to acknowledge that respondent was entitled to trial-related rights guaranteed by the Fifth and Sixth Amendments, but not to Fourth Amendment protection.

Held: The Fourth Amendment does not apply to the search and seizure by United States agents of property owned by a nonresident alien and located in a foreign country. Pp. 264-275.

(a) If there were a constitutional violation in this case, it occurred solely in Mexico, since a Fourth Amendment violation is fully accomplished at the time of an unreasonable governmental intrusion whether or not the evidence seized is sought for use in a criminal trial. Thus, the Fourth Amendment functions differently from the Fifth Amendment, whose privilege against self-incrimination is a fundamental trial right of criminal defendants. P. 264.

(b) The Fourth Amendment phrase "the people" seems to be a term of art used in select parts of the Constitution and contrasts with the words "person" and "accused" used in Articles of the Fifth and Sixth Amendments regulating criminal procedures. This suggests that "the people" refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. Pp. 264–266.

(c) The Fourth Amendment's drafting history shows that its purpose was to protect the people of the United States against arbitrary action by their own Government and not to restrain the Federal Government's actions against aliens outside United States territory. Nor is there any indication that the Amendment was understood by the Framers' contemporaries to apply to United States activities directed against aliens in foreign territory or in international waters. Pp. 266–268.

(d) The view that every constitutional provision applies wherever the Government exercises its power is contrary to this Court's decisions in the *Insular Cases*, which held that not all constitutional provisions apply to governmental activity even in territories where the United States has sovereign power. See, *e. g., Balzac* v. *Porto Rico*, 258 U. S. 298. Indeed, the claim that extraterritorial aliens are entitled to rights under the Fifth Amendment—which speaks in the relatively universal term of "person"—has been emphatically rejected. *Johnson* v. *Eisentrager*, 339 U. S. 763, 784. Pp. 268–269.

(e) Respondent's reliance on *Reid, supra*, is misplaced, since that case stands only for the proposition that United States *citizens* stationed abroad could invoke the protection of the Fifth and Sixth Amendments. Similarly, those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive such protections when they have come within the territory of, and have developed substantial connections with, this country. See, *e. g., Plyler* v. *Doe*, 457 U. S. 202, 212. Respondent, however, is an alien with no previous significant voluntary connection with the United States, and his legal but involuntary presence here does not indicate any substantial connection with this country. The Court of Appeals' reliance on *INS* v. *Lopez-Mendoza, supra*, is also misplaced, since that case assumed that, but did not expressly address the question whether, the Fourth Amendment applies to illegal aliens in the United States. Even assuming such aliens—who are in this country voluntarily and presumably have accepted some societal obligations—would be entitled to Fourth Amendment protections, their situation differs from that of respondent, who had no voluntary connection with this country that might place him among "the people." This Court's decisions expressly according differing protection to aliens than to citizens also undermine respondent's claim that treating aliens differently under the Fourth Amendment violates the equal protection component of the Fifth Amendment. Pp. 269–273.

(f) The Court of Appeals' rule would have significant and deleterious consequences for the United States in conducting activities beyond its borders. The rule would apply not only to law enforcement operations abroad, but also to other foreign operations—such as Armed Forces actions—which might result in "searches and seizures." Under the rule, aliens with no attachment to this country might bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters, and Members of the Executive and Legislative Branches would be plunged into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad. Any restrictions on searches and seizures incident to American action abroad must be imposed by the political branches through diplomatic understanding, treaty, or legislation. Pp. 273–275.

856 F. 2d 1214, reversed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 275. STEVENS, J., filed an opinion concurring in the judgment, *post*, p. 279. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 279. BLACKMUN, J., filed a dissenting opinion, *post*, p. 297.

Lawrence S. Robbins argued the cause for the United States. With him on the briefs were *Solicitor General Starr*, *Assistant Attorney General Dennis*, and *Deputy Solicitor General Bryson*.

Michael Pancer argued the cause for respondent. With him on the brief were *Charles L. Goldberg* and *Patrick Q. Hall*.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

The question presented by this case is whether the Fourth Amendment applies to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. We hold that it does not.

**Kent S. Scheidegger* filed a brief for the Criminal Justice Legal Foundation as *amicus curiae* urging reversal.

John A. Powell, *Paul L. Hoffman*, and *David D. Cole* filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Respondent Rene Martin Verdugo-Urquidez is a citizen and resident of Mexico. He is believed by the United States Drug Enforcement Agency (DEA) to be one of the leaders of a large and violent organization in Mexico that smuggles narcotics into the United States. Based on a complaint charging respondent with various narcotics-related offenses, the Government obtained a warrant for his arrest on August 3, 1985. In January 1986, Mexican police officers, after discussions with United States marshals, apprehended Verdugo-Urquidez in Mexico and transported him to the United States Border Patrol station in Calexico, California. There, United States marshals arrested respondent and eventually moved him to a correctional center in San Diego, California, where he remains incarcerated pending trial.

Following respondent's arrest, Terry Bowen, a DEA agent assigned to the Calexico DEA office, decided to arrange for searches of Verdugo-Urquidez's Mexican residences located in Mexicali and San Felipe. Bowen believed that the searches would reveal evidence related to respondent's alleged narcotics trafficking activities and his involvement in the kidnaping and torture-murder of DEA Special Agent Enrique Camarena Salazar (for which respondent subsequently has been convicted in a separate prosecution. See *United States* v. *Verdugo-Urquidez*, No. CR–87–422–ER (CD Cal., Nov. 22, 1988)). Bowen telephoned Walter White, the Assistant Special Agent in charge of the DEA office in Mexico City, and asked him to seek authorization for the search from the Director General of the Mexican Federal Judicial Police (MFJP). After several attempts to reach high ranking Mexican officials, White eventually contacted the Director General, who authorized the searches and promised the cooperation of Mexican authorities. Thereafter, DEA agents working in concert with officers of the MFJP searched respondent's properties in Mexicali and San Felipe and seized certain documents. In particular, the search of the Mexicali residence uncovered a tally sheet, which the Government believes reflects the quantities of marijuana smuggled by Verdugo-Urquidez into the United States.

The District Court granted respondent's motion to suppress evidence seized during the searches, concluding that the Fourth Amendment applied to the searches and that the DEA agents had failed to justify searching respondent's premises without a warrant. A divided panel of the Court of Appeals for the Ninth Circuit affirmed. 856 F. 2d 1214 (1988). It cited this Court's decision in *Reid* v. *Covert*, 354 U. S. 1 (1957), which held that American citizens tried by United States military authorities in a foreign country were entitled to the protections of the Fifth and Sixth Amendments, and concluded that "[t]he Constitution imposes substantive constraints on the federal government, even when it operates abroad." 856 F. 2d, at 1218. Relying on our decision in *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984), where a majority of Justices assumed that illegal aliens in the United States have Fourth Amendment rights, the Ninth Circuit majority found it "difficult to conclude that Verdugo-Urquidez lacks these same protections." 856 F. 2d, at 1223. It also observed that persons in respondent's position enjoy certain trial-related rights, and reasoned that "[i]t would be odd indeed to acknowledge that Verdugo-Urquidez is entitled to due process under the fifth amendment, and to a fair trial under the sixth amendment, . . . and deny him the protection from unreasonable searches and seizures afforded under the fourth amendment." *Id.*, at 1224. Having concluded that the Fourth Amendment applied to the searches of respondent's properties, the court went on to decide that the searches violated the Constitution because the DEA agents failed to procure a search warrant. Although recognizing that "an American search warrant would be of no legal validity in Mexico," the majority deemed it sufficient that a warrant would have "substantial constitutional value in this country," because it would reflect a magistrate's determination that there existed probable cause to search and would define the scope of the search. *Id.*, at 1230.

The dissenting judge argued that this Court's statement in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936), that "[n]either the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens," foreclosed any claim by respondent to Fourth Amendment rights. More broadly, he viewed the Constitution as a "compact" among the people of the United States, and the protections of the Fourth Amendment were expressly limited to "the people." We granted certiorari, 490 U. S. 1019 (1989).

Before analyzing the scope of the Fourth Amendment, we think it significant to note that it operates in a different manner than the Fifth Amendment, which is not at issue in this case. The privilege against self-incrimination guaranteed by the Fifth Amendment is a fundamental trial right of criminal defendants. See *Malloy* v. *Hogan*, 378 U. S. 1 (1964). Although conduct by law enforcement officials prior to trial may ultimately impair that right, a constitutional violation occurs only at trial. *Kastigar* v. *United States*, 406 U. S. 441, 453 (1972). The Fourth Amendment functions differently. It prohibits "unreasonable searches and seizures" whether or not the evidence is sought to be used in a criminal trial, and a violation of the Amendment is "fully accomplished" at the time of an unreasonable governmental intrusion. *United States* v. *Calandra*, 414 U. S. 338, 354 (1974); *United States* v. *Leon*, 468 U. S. 897, 906 (1984). For purposes of this case, therefore, if there were a constitutional violation, it occurred solely in Mexico. Whether evidence obtained from respondent's Mexican residences should be excluded at trial in the United States is a remedial question separate from the existence *vel non* of the constitutional violation. *Calandra*, *supra*, at 354; *Leon*, *supra*, at 906.

The Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That text, by contrast with the Fifth and Sixth Amendments, extends its reach only to "the people." Contrary to the suggestion of *amici curiae* that the Framers used this phrase "simply to avoid [an] awkward rhetorical redundancy," Brief for American Civil Liberties Union et al. as *Amici Curiae* 12, n. 4, "the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U. S. Const., Amdt. 1 ("Congress shall make no law . . . abridging . . . *the right of the people* peaceably to assemble") (emphasis added); Art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year *by the People of the several States*") (emphasis added). While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community. See *United States ex rel. Turner* v. *Williams*, 194 U. S. 279, 292 (1904) (Excludable alien is not entitled to First Amendment rights, because "[h]e does not become one of the people to whom these things are secured by our Constitution by an attempt to enter forbidden by law"). The language of these Amendments contrasts with the words "person" and "accused" used in the Fifth and Sixth Amendments regulating procedure in criminal cases.

What we know of the history of the drafting of the Fourth Amendment also suggests that its purpose was to restrict searches and seizures which might be conducted by the United States in domestic matters. The Framers originally decided not to include a provision like the Fourth Amendment, because they believed the National Government lacked power to conduct searches and seizures. See C. Warren, The Making of the Constitution 508–509 (1928); The Federalist No. 84, p. 513 (C. Rossiter ed. 1961) (A. Hamilton); 1 Annals of Cong. 437 (1789) (statement of J. Madison). Many disputed the original view that the Federal Government possessed only narrow delegated powers over domestic affairs, however, and ultimately felt an Amendment prohibiting unreasonable searches and seizures was necessary. Madison, for example, argued that "there is a clause granting to Congress the power to make all laws which shall be necessary and proper for carrying into execution all of the powers vested in the Government of the United States," and that general warrants might be considered "necessary" for the purpose of collecting revenue. *Id.*, at 438. The driving force behind the adoption of the Amendment, as suggested by Madison's advocacy, was widespread hostility among the former colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel. See *Boyd* v. *United States*, 116 U. S. 616, 625–626 (1886). The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory.

There is likewise no indication that the Fourth Amendment was understood by contemporaries of the Framers to apply to activities of the United States directed against aliens in foreign territory or in international waters. Only seven years after the ratification of the Amendment, French interference with American commercial vessels engaged in neutral trade triggered what came to be known as the "undeclared war" with France. In an Act to "protect the Commerce of the United States" in 1798, Congress authorized President Adams to "instruct the commanders of the public armed vessels which are, or which shall be employed in the service of the United States, to subdue, seize and take any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere, on the high seas." § 1 of An Act Further to Protect the Commerce of the United States, ch. 68, 1 Stat. 578. This public naval force consisted of only 45 vessels, so Congress also gave the President power to grant to the owners of private armed ships and vessels of the United States "special commissions," which would allow them "the same license and authority for the subduing, seizing and capturing any armed French vessel, and for the recapture of the vessels, goods and effects of the people of the United States, as the public armed vessels of the United States may by law have." § 2, 1 Stat. 579; see U. S. Const., Art. I, § 8, cl. 11 (Congress has power to grant letters of marque and reprisal). Under the latter provision, 365 private armed vessels were commissioned before March 1, 1799, see G. Allen, Our Naval War with France 59 (1967); together, these enactments resulted in scores of seizures of foreign vessels under congressional authority. See M. Palmer, Stoddert's War: Naval Operations During the Quasi-War with France, 1798–1801, p. 235 (1987). See also An Act Further to Suspend the Commercial Intercourse Between the United States and France, ch. 2, 1 Stat. 613. Some commanders were held liable by this Court for unlawful seizures because their actions were beyond the scope of the congressional grant of authority, see, *e. g., Little* v. *Barreme*, 2 Cranch 170, 177–178 (1804); cf. *Talbot* v. *Seeman*, 1 Cranch 1, 31 (1801) (seizure of neutral ship lawful where American captain had probable cause to believe vessel was French), but it was never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this.

The global view taken by the Court of Appeals of the application of the Constitution is also contrary to this Court's decisions in the *Insular Cases*, which held that not every constitutional provision applies to governmental activity even where the United States has sovereign power. See, *e. g., Balzac* v. *Porto Rico*, 258 U. S. 298 (1922) (Sixth Amendment right to jury trial inapplicable in Puerto Rico); *Ocampo* v. *United States*, 234 U. S. 91 (1914) (Fifth Amendment grand jury provision inapplicable in Philippines); *Dorr* v. *United States*, 195 U. S. 138 (1904) (jury trial provision inapplicable in Philippines); *Hawaii* v. *Mankichi*, 190 U. S. 197 (1903) (provisions on indictment by grand jury and jury trial inapplicable in Hawaii); *Downes* v. *Bidwell*, 182 U. S. 244 (1901) (Revenue Clauses of Constitution inapplicable to Puerto Rico). In *Dorr*, we declared the general rule that in an unincorporated territory—one not clearly destined for statehood—Congress was not required to adopt "a system of laws which shall include the right of trial by jury, and that *the Constitution does not, without legislation and of its own force, carry such right to territory so situated.*" 195 U. S., at 149 (emphasis added). Only "fundamental" constitutional rights are guaranteed to inhabitants of those territories. *Id.*, at 148; *Balzac, supra*, at 312–313; see *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, 426 U. S. 572, 599, n. 30 (1976). If that is true with respect to territories ultimately governed by Congress, respondent's claim that the protections of the Fourth Amendment extend to aliens in foreign nations is even weaker. And certainly, it is not open to us in light of the *Insular Cases* to endorse the view that every constitutional provision applies wherever the United States Government exercises its power.

Indeed, we have rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States. In *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), the Court held that enemy aliens arrested in China and imprisoned in Germany after World War II could not obtain writs of habeas corpus in our federal courts on the ground that their convictions for war crimes had violated the Fifth Amendment and other constitutional provisions. The *Eisentrager* opinion acknowledged that in some cases constitutional provisions extend beyond the citizenry; "[t]he alien . . . has been accorded a generous and ascending scale of rights as he increases his identity with our society." *Id.*, at 770. But our rejection of extraterritorial application of the Fifth Amendment was emphatic:

> "Such extraterritorial application of organic law would have been so significant an innovation in the practice of governments that, if intended or apprehended, it could scarcely have failed to excite contemporary comment. Not one word can be cited. No decision of this Court supports such a view. *Cf. Downes* v. *Bidwell*, 182 U. S. 244 [(1901)]. None of the learned commentators on our Constitution has even hinted at it. The practice of every modern government is opposed to it." *Id.*, at 784.

If such is true of the Fifth Amendment, which speaks in the relatively universal term of "person," it would seem even more true with respect to the Fourth Amendment, which applies only to "the people."

To support his all-encompassing view of the Fourth Amendment, respondent points to language from the plurality opinion in *Reid* v. *Covert*, 354 U. S. 1 (1957). *Reid* involved an attempt by Congress to subject the wives of American servicemen to trial by military tribunals without the protection of the Fifth and Sixth Amendments. The Court held that it was unconstitutional to apply the Uniform Code of Military

Justice to the trials of the American women for capital crimes. Four Justices "reject[ed] the idea that when the United States acts *against citizens* abroad it can do so free of the Bill of Rights." *Id.*, at 5 (emphasis added). The plurality went on to say:

> "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish *a citizen* who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land." *Id.*, at 5–6 (emphasis added; footnote omitted).

Respondent urges that we interpret this discussion to mean that federal officials are constrained by the Fourth Amendment wherever and against whomever they act. But the holding of *Reid* stands for no such sweeping proposition: it decided that United States citizens stationed abroad could invoke the protection of the Fifth and Sixth Amendments. The concurrences by Justices Frankfurter and Harlan in *Reid* resolved the case on much narrower grounds than the plurality and declined even to hold that United States citizens were entitled to the full range of constitutional protections in all overseas criminal prosecutions. See *id.*, at 75 (Harlan, J., concurring in result) ("I agree with my brother FRANKFURTER that . . . we have before us a question analogous, ultimately, to issues of due process; one can say, in fact, that the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case"). Since respondent is not a United States citizen, he can derive no comfort from the *Reid* holding.

Verdugo-Urquidez also relies on a series of cases in which we have held that aliens enjoy certain constitutional rights.

See, *e. g., Plyler* v. *Doe,* 457 U. S. 202, 211–212 (1982) (illegal aliens protected by Equal Protection Clause); *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment); *Bridges* v. *Wixon,* 326 U. S. 135, 148 (1945) (resident aliens have First Amendment rights); *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481 (1931) (Just Compensation Clause of Fifth Amendment); *Wong Wing* v. *United States,* 163 U. S. 228, 238 (1896) (resident aliens entitled to Fifth and Sixth Amendment rights); *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369 (1886) (Fourteenth Amendment protects resident aliens). These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country. See, *e. g., Plyler, supra,* at 212 (The provisions of the Fourteenth Amendment " 'are universal in their application, *to all persons within the territorial jurisdiction . . .*' ") (quoting *Yick Wo, supra,* at 369); *Kwong Hai Chew, supra,* at 596, n. 5 ("The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But *once an alien lawfully enters and resides in this country* he becomes invested with the rights guaranteed by the Constitution to all people within our borders") (quoting *Bridges, supra,* at 161 (concurring opinion) (emphasis added)). Respondent is an alien who has had no previous significant voluntary connection with the United States, so these cases avail him not.

JUSTICE STEVENS' concurrence in the judgment takes the view that even though the search took place in Mexico, it is nonetheless governed by the requirements of the Fourth Amendment because respondent was "lawfully present in the United States . . . even though he was brought and held here against his will." *Post,* at 279. But this sort of presence—lawful but involuntary—is not of the sort to indicate any substantial connection with our country. The extent to which respondent might claim the protection of the Fourth Amendment if the duration of his stay in the United States were to be prolonged—by a prison sentence, for example—we need not decide. When the search of his house in Mexico took place, he had been present in the United States for only a matter of days. We do not think the applicability of the Fourth Amendment to the search of premises in Mexico should turn on the fortuitous circumstance of whether the custodian of its nonresident alien owner had or had not transported him to the United States at the time the search was made.

The Court of Appeals found some support for its holding in our decision in *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984), where a majority of Justices assumed that the Fourth Amendment applied to illegal aliens in the United States. We cannot fault the Court of Appeals for placing some reliance on the case, but our decision did not expressly address the proposition gleaned by the court below. The question presented for decision in *Lopez-Mendoza* was limited to whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings; it did not encompass whether the protections of the Fourth Amendment extend to illegal aliens in this country. The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions, compare, *e. g.*, *Maine* v. *Thiboutot*, 448 U. S. 1 (1980) (assuming State is a "person" within the meaning of 42 U. S. C. § 1983), with *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58 (1989) (State is not a "person"), and such assumptions—even on jurisdictional issues—are not binding in future cases that directly raise the questions. *Id.*, at 63, n. 4; *Hagans* v. *Lavine*, 415 U. S. 528, 535, n. 5 (1974). Our statements in *Lopez-Mendoza* are therefore not dispositive of how the Court would rule on a Fourth Amendment claim by illegal aliens in the United States if such a claim were squarely before us. Even assuming such aliens would be entitled to Fourth Amendment protections, their situation is different from respondent's. The illegal aliens in *Lopez-Mendoza* were in the United States voluntarily and presumably had accepted some societal obligations; but respondent had no voluntary connection with this country that might place him among "the people" of the United States.

Respondent also contends that to treat aliens differently from citizens with respect to the Fourth Amendment somehow violates the equal protection component of the Fifth Amendment to the United States Constitution. He relies on *Graham* v. *Richardson*, 403 U. S. 365 (1971), and *Foley* v. *Connelie*, 435 U. S. 291 (1978), for this proposition. But the very cases previously cited with respect to the protection extended by the Constitution to aliens undermine this claim. They are constitutional decisions of this Court expressly according differing protection to aliens than to citizens, based on our conclusion that the particular provisions in question were not intended to extend to aliens in the same degree as to citizens. Cf. *Mathews* v. *Diaz*, 426 U. S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens").

Not only are history and case law against respondent, but as pointed out in *Johnson* v. *Eisentrager*, 393 U. S. 763 (1950), the result of accepting his claim would have significant and deleterious consequences for the United States in conducting activities beyond its boundaries. The rule adopted by the Court of Appeals would apply not only to law enforcement operations abroad, but also to other foreign policy operations which might result in "searches or seizures." The United States frequently employs Armed Forces outside this country—over 200 times in our history—for the protection of American citizens or national security. Congressional Research Service, Instances of Use of United States Armed Forces Abroad, 1798–1989 (E. Collier ed. 1989). Application of the Fourth Amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. Were respondent to prevail, aliens with no attachment to this country might well bring actions for damages to remedy claimed violations of the Fourth Amendment in foreign countries or in international waters. See *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U. S. 388 (1971); cf. *Tennessee* v. *Garner*, 471 U. S. 1 (1985); *Graham* v. *Connor*, 490 U. S. 386 (1989). Perhaps a *Bivens* action might be unavailable in some or all of these situations due to "'special factors counselling hesitation,'" see *Chappell* v. *Wallace*, 462 U. S. 296, 298 (1983) (quoting *Bivens*, *supra*, at 396), but the Government would still be faced with case-by-case adjudications concerning the availability of such an action. And even were *Bivens* deemed wholly inapplicable in cases of foreign activity, that would not obviate the problems attending the application of the Fourth Amendment abroad to aliens. The Members of the Executive and Legislative Branches are sworn to uphold the Constitution, and they presumably desire to follow its commands. But the Court of Appeals' global view of its applicability would plunge them into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad. Indeed, the Court of Appeals held that absent exigent circumstances, United States agents could not effect a "search or seizure" for law enforcement purposes in a foreign country without first obtaining a warrant—which would be a dead letter outside the United States—from a magistrate in this country. Even if no warrant were required, American agents would have to articulate specific facts giving them probable cause to undertake a search or seizure if they wished to comply with the Fourth Amendment as conceived by the Court of Appeals.

We think that the text of the Fourth Amendment, its history, and our cases discussing the application of the Constitution to aliens and extraterritorially require rejection of respondent's claim. At the time of the search, he was a citizen and resident of Mexico with no voluntary attachment to the

United States, and the place searched was located in Mexico. Under these circumstances, the Fourth Amendment has no application.

For better or for worse, we live in a world of nation-states in which our Government must be able to "functio[n] effectively in the company of sovereign nations." *Perez* v. *Brownell*, 356 U. S. 44, 57 (1958). Some who violate our laws may live outside our borders under a regime quite different from that which obtains in this country. Situations threatening to important American interests may arise halfway around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

The judgment of the Court of Appeals is accordingly

Reversed.

JUSTICE KENNEDY, concurring.

I agree that no violation of the Fourth Amendment has occurred and that we must reverse the judgment of the Court of Appeals. Although some explanation of my views is appropriate given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the Court, which I join.

In cases involving the extraterritorial application of the Constitution, we have taken care to state whether the person claiming its protection is a citizen, see, *e. g.*, *Reid* v. *Covert*, 354 U. S. 1 (1957), or an alien, see, *e. g.*, *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950). The distinction between citizens and aliens follows from the undoubted proposition that the Constitution does not create, nor do general principles of law create, any juridical relation between our country and some undefined, limitless class of noncitizens who are beyond our territory. We should note, however, that the absence of this relation does not depend on the idea that only a limited class of persons ratified the instrument that formed our Government. Though it must be beyond dispute that persons outside the United States did not and could not assent to the Constitution, that is quite irrelevant to any construction of the powers conferred or the limitations imposed by it. As Justice Story explained in his Commentaries:

> "A government may originate in the voluntary compact or assent of the people of several states, or of a people never before united, and yet when adopted and ratified by them, be no longer a matter resting in compact; but become an executed government or constitution, a fundamental law, and not a mere league. But the difficulty in asserting it to be a compact between the people of each state, and all the people of the other states is, that the constitution itself contains no such expression, and no such designation of parties." 1 Commentaries on the Constitution §365, p. 335 (1833) (footnote omitted).

The force of the Constitution is not confined because it was brought into being by certain persons who gave their immediate assent to its terms.

For somewhat similar reasons, I cannot place any weight on the reference to "the people" in the Fourth Amendment as a source of restricting its protections. With respect, I submit these words do not detract from its force or its reach. Given the history of our Nation's concern over warrantless and unreasonable searches, explicit recognition of "the right of the people" to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it. The restrictions that the United States must observe with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of "the people."

I take it to be correct, as the plurality opinion in *Reid* v. *Covert* sets forth, that the Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic. See 354 U. S., at 6. But this principle is only a first step in resolving this case. The question before us then becomes what constitutional standards apply when the Government acts, in reference to an alien, within its sphere of foreign operations. We have not overruled either *In re Ross*, 140 U. S. 453 (1891), or the so-called *Insular Cases* (*i. e., Downes* v. *Bidwell*, 182 U. S. 244 (1901); *Hawaii* v. *Mankichi*, 190 U. S. 197 (1903); *Dorr* v. *United States*, 195 U. S. 138 (1904); *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922)). These authorities, as well as *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 318 (1936), stand for the proposition that we must interpret constitutional protections in light of the undoubted power of the United States to take actions to assert its legitimate power and authority abroad. Justice Harlan made this observation in his opinion concurring in the judgment in *Reid* v. *Covert:*

> "I cannot agree with the suggestion that every provision of the Constitution must always be deemed automatically applicable to American citizens in every part of the world. For *Ross* and the *Insular Cases* do stand for an important proposition, one which seems to me a wise and necessary gloss on our Constitution. The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not *necessarily* apply in all circumstances in every foreign place. In other words, it seems to me that the basic teaching of *Ross* and the *Insular Cases* is that there is no rigid and abstract rule that Congress, as a condition precedent to exercising power over Americans overseas, must exercise it subject to all the guarantees of the Constitution, no matter what the conditions and considerations are that would make adherence to a

> specific guarantee altogether impracticable and anomalous." 354 U. S., at 74.

The conditions and considerations of this case would make adherence to the Fourth Amendment's warrant requirement impracticable and anomalous. Just as the Constitution in the *Insular Cases* did not require Congress to implement all constitutional guarantees in its territories because of their "wholly dissimilar traditions and institutions," the Constitution does not require United States agents to obtain a warrant when searching the foreign home of a nonresident alien. If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply. But that is not this case. The absence of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials all indicate that the Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country. For this reason, in addition to the other persuasive justifications stated by the Court, I agree that no violation of the Fourth Amendment has occurred in the case before us. The rights of a citizen, as to whom the United States has continuing obligations, are not presented by this case.

I do not mean to imply, and the Court has not decided, that persons in the position of the respondent have no constitutional protection. The United States is prosecuting a foreign national in a court established under Article III, and all of the trial proceedings are governed by the Constitution. All would agree, for instance, that the dictates of the Due Process Clause of the Fifth Amendment protect the defendant. Indeed, as Justice Harlan put it, "the question of which specific safeguards . . . are appropriately to be applied in a particular context . . . can be reduced to the issue of what process is 'due' a defendant in the particular circumstances of a particular case." *Reid*, *supra*, at 75. Nothing approaching a violation of due process has occurred in this case.

JUSTICE STEVENS, concurring in the judgment.

In my opinion aliens who are lawfully present in the United States are among those "people" who are entitled to the protection of the Bill of Rights, including the Fourth Amendment. Respondent is surely such a person even though he was brought and held here against his will. I therefore cannot join the Court's sweeping opinion.* I do agree, however, with the Government's submission that the search conducted by the United States agents with the approval and cooperation of the Mexican authorities was not "unreasonable" as that term is used in the first Clause of the Amendment. I do not believe the Warrant Clause has any application to searches of noncitizens' homes in foreign jurisdictions because American magistrates have no power to authorize such searches. I therefore concur in the Court's judgment.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court holds that although foreign nationals must abide by our laws even when in their own countries, our Government need not abide by the Fourth Amendment when it investigates them for violations of our laws. I respectfully dissent.

I

Particularly in the past decade, our Government has sought, successfully, to hold foreign nationals criminally liable under federal laws for conduct committed entirely beyond the territorial limits of the United States that nevertheless has effects in this country. Foreign nationals must now take care not to violate our drug laws,[1] our antitrust laws,[2] our securities laws,[3] and a host of other federal criminal statutes.[4] The enormous expansion of federal criminal jurisdiction outside our Nation's boundaries has led one commentator to suggest that our country's three largest exports are now "rock music, blue jeans, and United States law." Grundman, The New Imperialism: The Extraterritorial Application of United States Law, 14 Int'l Law. 257, 257 (1980).

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*The Court's interesting historical discussion is simply irrelevant to the question whether an alien lawfully within the sovereign territory of the United States is entitled to the protection of our laws. Nor is comment on illegal aliens' entitlement to the protections of the Fourth Amendment necessary to resolve this case.

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[1] Federal drug enforcement statutes written broadly enough to permit extraterritorial application include laws proscribing the manufacture, distribution, or possession with intent to manufacture or distribute of controlled substances on board vessels, see 46 U. S. C. App. § 1903(h) (1982 ed., Supp. V) ("This section is intended to reach acts . . . committed outside the territorial jurisdiction of the United States"), the possession, manufacture, or distribution of a controlled substance for purposes of unlawful importation, see 21 U. S. C. § 959(c) (same), and conspiracy to violate federal narcotics laws, see *Chua Han Mow* v. *United States*, 730 F. 2d 1308, 1311–1312 (CA9 1984) (applying 21 U. S. C. §§ 846 and 963 to conduct by a Malaysian citizen in Malaysia), cert. denied, 470 U. S. 1031 (1985).

[2] The Sherman Act defines "person" to include foreign corporations, 15 U. S. C. § 7, and has been applied to certain conduct beyond the territorial limits of the United States by foreign corporations and nationals for at least 45 years. See *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 443–444 (CA2 1945).

[3] Foreign corporations may be liable under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), for transactions that occur outside the United States if the transactions involve stock registered and listed on a national securities exchange and the alleged conduct is "detrimental to the interests of American investors." *Schoenbaum* v. *Firstbrook*, 405 F. 2d 200, 208 (CA2), rev'd on rehearing on other grounds, 405 F. 2d 215 (CA2 1968) (en banc), cert. denied, 395 U. S. 906 (1969).

[4] See, *e. g.*, 18 U. S. C. § 32(b) (violence against an individual aboard or destruction of any "civil aircraft registered in a country other than the United States while such aircraft is in flight"); § 111 (assaulting, resisting, or impeding certain officers or employees); § 115 (influencing, impeding, or retaliating against a federal official by threatening or injuring a family member); §§ 1114, 1117 (murder, attempted murder, and conspiracy to murder certain federal officers and employees); § 1201(a)(5) (kidnaping of federal officers and employees listed in § 1114); § 1201(e) (kidnaping of "an internationally protected person," if the alleged offender is found in the United States, "irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender"); § 1203 (hostage taking outside the United States, if the offender or the person seized is a United States national, if the offender is found in the United States, or if "the governmental organization sought to be compelled is the Government of the United States"); § 1546 (fraud and misuse of visas, permits, and

The Constitution is the source of Congress' authority to criminalize conduct, whether here or abroad, and of the Executive's authority to investigate and prosecute such conduct. But the same Constitution also prescribes limits on our Government's authority to investigate, prosecute, and punish criminal conduct, whether foreign or domestic. As a plurality of the Court noted in *Reid* v. *Covert*, 354 U. S. 1, 5–6 (1957): "The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution." (Footnotes omitted.) See also *ante*, at 277 (KENNEDY, J., concurring) ("[T]he Government may act only as the Constitution authorizes, whether the actions in question are foreign or domestic"). In particular, the Fourth Amendment provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue but upon probable cause, supported by

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other immigration documents); § 2331 (terrorist acts abroad against United States nationals); 49 U. S. C. App. § 1472(n) (1982 ed. and Supp. V) (aircraft piracy outside the special aircraft jurisdiction of the United States, if the offender is found in the United States). Foreign nationals may also be criminally liable for numerous federal crimes falling within the "special maritime and territorial jurisdiction of the United States," which includes "[a]ny place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States." 18 U. S. C. § 7(7). Finally, broad construction of federal conspiracy statutes may permit prosecution of foreign nationals who have had no direct contact with anyone or anything in the United States. See *Ford* v. *United States*, 273 U. S. 593, 619–620 (1927).

> Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Court today creates an antilogy: the Constitution authorizes our Government to enforce our criminal laws abroad, but when Government agents exercise this authority, the Fourth Amendment does not travel with them. This cannot be. At the very least, the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law.

A

The Fourth Amendment guarantees the right of "the people" to be free from unreasonable searches and seizures and provides that a warrant shall issue only upon presentation of an oath or affirmation demonstrating probable cause and particularly describing the place to be searched and the persons or things to be seized. According to the majority, the term "the people" refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." *Ante*, at 265. The Court admits that "the people" extends beyond the citizenry, but leaves the precise contours of its "sufficient connection" test unclear. At one point the majority hints that aliens are protected by the Fourth Amendment only when they come within the United States and develop "substantial connections" with our country. *Ante*, at 271. At other junctures, the Court suggests that an alien's presence in the United States must be voluntary[5] and that the alien must have "accepted some societal obligations."[6] *Ante*, at 273. At yet other points, the majority implies that respondent would be protected by the Fourth Amendment if the place searched were in the United States.[7] *Ante*, at 266, 274–275.

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[5] None of the cases cited by the majority, *ante*, at 271, requires an alien's connections to the United States to be "voluntary" before the alien can claim the benefits of the Constitution. Indeed, *Mathews* v. *Diaz*, 426 U. S. 67, 77 (1976), explicitly rejects the notion that an individual's connections to the United States must be voluntary or sustained to qualify for constitutional protection. Furthermore, even if a voluntariness requirement were sensible in cases guaranteeing certain governmental benefits to illegal aliens, *e. g.*, *Plyler* v. *Doe*, 457 U. S. 202 (1982) (holding

What the majority ignores, however, is the most obvious connection between Verdugo-Urquidez and the United States: he was investigated and is being prosecuted for violations of United States law and may well spend the rest of his life in a United States prison. The "sufficient connection" is supplied not by Verdugo-Urquidez, but by the Government.

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that States cannot deny to illegal aliens the free public education they provide to citizens and legally documented aliens), it is not a sensible requirement when our Government chooses to impose our criminal laws on others.

[6] In this discussion, the Court implicitly suggests that the Fourth Amendment may not protect illegal aliens in the United States. *Ante*, at 273. Numerous lower courts, however, have held that illegal aliens in the United States are protected by the Fourth Amendment, and not a single lower court has held to the contrary. See, *e. g.*, *Benitez-Mendez* v. *INS*, 760 F. 2d 907 (CA9 1985); *United States* v. *Rodriguez*, 532 F. 2d 834, 838 (CA2 1976); *Au Yi Lau* v. *INS*, 144 U. S. App. D. C. 147, 156, 445 F. 2d 217, 225, cert. denied, 404 U. S. 864 (1971); *Yam Sang Kwai* v. *INS*, 133 U. S. App. D. C. 369, 372, 411 F. 2d 683, 686, cert. denied, 396 U. S. 877 (1969).

[7] The Fourth Amendment contains no express or implied territorial limitations, and the majority does not hold that the Fourth Amendment is inapplicable to searches outside the United States and its territories. It holds that respondent is not protected by the Fourth Amendment because he is not one of "the people." Indeed, the majority's analysis implies that a foreign national who had "developed sufficient connection with this country to be considered part of [our] community" would be protected by the Fourth Amendment regardless of the location of the search. Certainly nothing in the Court's opinion questions the validity of the rule, accepted by every Court of Appeals to have considered the question, that the Fourth Amendment applies to searches conducted by the United States Government against United States citizens abroad. See, *e. g.*, *United States* v. *Conroy*, 589 F. 2d 1258, 1264 (CA5), cert. denied, 444 U. S. 831 (1979); *United States* v. *Rose*, 570 F. 2d 1358, 1362 (CA9 1978). A warrantless, unreasonable search and seizure is no less a violation of the Fourth Amendment because it occurs in Mexicali, Mexico, rather than Calexico, California.

Respondent is entitled to the protections of the Fourth Amendment because our Government, by investigating him and attempting to hold him accountable under United States criminal laws, has treated him as a member of our community for purposes of enforcing our laws. He has become, quite literally, one of the governed. Fundamental fairness and the ideals underlying our Bill of Rights compel the conclusion that when we impose "societal obligations," *ante*, at 273, such as the obligation to comply with our criminal laws, on foreign nationals, we in turn are obliged to respect certain correlative rights, among them the Fourth Amendment.

By concluding that respondent is not one of "the people" protected by the Fourth Amendment, the majority disregards basic notions of mutuality. If we expect aliens to obey our laws, aliens should be able to expect that we will obey our Constitution when we investigate, prosecute, and punish them. We have recognized this fundamental principle of mutuality since the time of the Framers. James Madison, universally recognized as the primary architect of the Bill of Rights, emphasized the importance of mutuality when he spoke out against the Alien and Sedition Acts less than a decade after the adoption of the Fourth Amendment:

> "[I]t does not follow, because aliens are not parties to the Constitution, as citizens are parties to it, that, whilst they actually conform to it, they have no right to its protection. Aliens are not more parties to the laws than they are parties to the Constitution; yet it will not be disputed that, as they owe, on one hand, a temporary obedience, they are entitled, in return, to their protection and advantage." Madison's Report on the Virginia Resolutions (1800), reprinted in 4 Elliot's Debates 556 (2d ed. 1836).

Mutuality is essential to ensure the fundamental fairness that underlies our Bill of Rights. Foreign nationals investigated and prosecuted for alleged violations of United States criminal laws are just as vulnerable to oppressive Government behavior as are United States citizens investigated and prosecuted for the same alleged violations. Indeed, in a case such as this where the Government claims the existence of an international criminal conspiracy, citizens and foreign nationals may be codefendants, charged under the same statutes for the same conduct and facing the same penalties if convicted. They may have been investigated by the same agents pursuant to the same enforcement authority. When our Government holds these codefendants to the same standards of conduct, the Fourth Amendment, which protects the citizen from unreasonable searches and seizures, should protect the foreign national as well.

Mutuality also serves to inculcate the values of law and order. By respecting the rights of foreign nationals, we encourage other nations to respect the rights of our citizens. Moreover, as our Nation becomes increasingly concerned about the domestic effects of international crime, we cannot forget that the behavior of our law enforcement agents abroad sends a powerful message about the rule of law to individuals everywhere. As Justice Brandeis warned in *Olmstead* v. *United States*, 277 U. S. 438 (1928):

> "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine, this Court should resolutely set its face." *Id.*, at 485 (dissenting opinion).

This principle is no different when the United States applies its rules of conduct to foreign nationals. If we seek respect for law and order, we must observe these principles ourselves. Lawlessness breeds lawlessness.

Finally, when United States agents conduct unreasonable searches, whether at home or abroad, they disregard our Nation's values. For over 200 years, our country has considered itself the world's foremost protector of liberties. The privacy and sanctity of the home have been primary tenets of our moral, philosophical, and judicial beliefs.[8] Our national interest is defined by those values and by the need to preserve our own just institutions. We take pride in our commitment to a Government that cannot, on mere whim, break down doors and invade the most personal of places. We exhort other nations to follow our example. How can we explain to others—and to ourselves—that these long cherished ideals are suddenly of no consequence when the door being broken belongs to a foreigner?

The majority today brushes aside the principles of mutuality and fundamental fairness that are central to our Nation's constitutional conscience. The Court articulates a "sufficient connection" test but then refuses to discuss the underlying principles upon which any interpretation of that test must rest. I believe that by placing respondent among those governed by federal criminal laws and investigating him for violations of those laws, the Government has made him a part of our community for purposes of the Fourth Amendment.

B

In its effort to establish that respondent does not have sufficient connection to the United States to be considered one of "the people" protected by the Fourth Amendment, the Court relies on the text of the Amendment, historical evidence, and cases refusing to apply certain constitutional provisions outside the United States. None of these, however, justifies the majority's cramped interpretation of the Fourth Amendment's applicability.

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[8] President John Adams traced the origins of our independence from England to James Otis' impassioned argument in 1761 against the British writs of assistance, which allowed revenue officers to search American homes wherever and whenever they wanted. Otis argued that "[a] man's house is his castle," 2 Works of John Adams 524 (C. Adams ed. 1850), and Adams declared that "[t]hen and there the child Independence was born." 10 Works of John Adams 248 (C. Adams ed. 1856).

The majority looks to various constitutional provisions and suggests that "'the people' seems to have been a term of art." *Ante,* at 265. But the majority admits that its "textual exegesis is by no means conclusive." *Ibid.*[9] One Member of the majority even states that he "cannot place any weight on the reference to 'the people' in the Fourth Amendment as a source of restricting its protections." *Ante,* at 276 (KENNEDY, J., concurring). The majority suggests a restrictive interpretation of those with "sufficient connection" to this country to be considered among "the people," but the term "the people" is better understood as a rhetorical counterpoint to "the Government," such that rights that were reserved to "the people" were to protect all those subject to "the Government." Cf. *New Jersey* v. *T. L. O.*, 469 U. S. 325, 335 (1985) ("[T]he Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon 'governmental action'"). "The people" are "the governed."

In drafting both the Constitution and the Bill of Rights, the Framers strove to create a form of Government decidedly different from their British heritage. Whereas the British Parliament was unconstrained, the Framers intended to create a Government of limited powers. See B. Bailyn, The Ideological Origins of the American Revolution 182 (1967); 1 The Complete Anti-Federalist 65 (H. Storing ed. 1981). The colonists considered the British Government dangerously omnipotent. After all, the British declaration of rights in

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[9] The majority places an unsupportable reliance on the fact that the Drafters used "the people" in the Fourth Amendment while using "person" and "accused" in the Fifth and Sixth Amendments respectively, see *ante,* at 265–266. The Drafters purposely did not use the term "accused." As the majority recognizes, *ante,* at 264, the Fourth Amendment is violated at the time of an unreasonable governmental intrusion, even if the victim of unreasonable governmental action is never formally "accused" of any wrongdoing. The majority's suggestion that the Drafters could have used "person" ignores the fact that the Fourth Amendment then would have begun quite awkwardly: "The right of persons to be secure in their persons . . . ."

1688 had been enacted not by the people, but by Parliament. The Federalist No. 84, p. 439 (M. Beloff ed. 1987). Americans vehemently attacked the notion that rights were matters of "'favor and grace,'" given *to* the people *from* the Government. B. Bailyn, *supra,* at 187 (quoting John Dickinson).

Thus, the Framers of the Bill of Rights did not purport to "create" rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be pre-existing. See, *e. g.*, U. S. Const., Amdt. 9 ("The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people"). The Fourth Amendment, for example, does not create a new right of security against unreasonable searches and seizures. It states that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, *shall not be violated* . . . ." The focus of the Fourth Amendment is on *what* the Government can and cannot do, and *how* it may act, not on *against whom* these actions may be taken. Bestowing rights and delineating protected groups would have been inconsistent with the Drafters' fundamental conception of a Bill of Rights as a limitation on the Government's conduct with respect to all whom it seeks to govern. It is thus extremely unlikely that the Framers intended the narrow construction of the term "the people" presented today by the majority.

The drafting history of the Fourth Amendment also does not support the majority's interpretation of "the people." First, the Drafters chose not to limit the right against unreasonable searches and seizures in more specific ways. They could have limited the right to "citizens," "freemen," "residents," or "the American people." The conventions called to ratify the Constitution in New York and Virginia, for example, each recommended an amendment stating, "That every freeman has a right to be secure from all unreasonable searches and seizures . . . ." W. Cuddihy, Search and Seizure in Great Britain and the American Colonies, pt. 2, p. 571, n. 129, 574, n. 134 (1974). But the Drafters of the Fourth Amendment rejected this limitation and instead provided broadly for "[t]he right of the people to be secure in their persons, houses, papers, and effects." Second, historical materials contain no evidence that the Drafters intended to limit the availability of the right expressed in the Fourth Amendment.[10] The Amendment was introduced on the floor of Congress, considered by Committee, debated by the House of Representatives and the Senate, and submitted to the 13 States for approval. Throughout that entire process, no speaker or commentator, pro or con, referred to the term "the people" as a limitation.

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[10] The only historical evidence the majority sets forth in support of its restrictive interpretation of the Fourth Amendment involves the seizure of French vessels during an "undeclared war" with France in 1798 and 1799. Because opinions in two Supreme Court cases, *Little* v. *Barreme*, 2 Cranch 170 (1804), and *Talbot* v. *Seeman*, 1 Cranch 1 (1801), "never suggested that the Fourth Amendment restrained the authority of Congress or of United States agents to conduct operations such as this," *ante*, at 268, the majority deduces that those alive when the Fourth Amendment was adopted did not believe it protected foreign nationals. Relying on the *absence* of any discussion of the Fourth Amendment in these decisions, however, runs directly contrary to the majority's admonition that the Court only truly decides that which it "expressly address[es]." *Ante*, at 272 (discussing *INS* v. *Lopez-Mendoza*, 468 U. S. 1032 (1984)). Moreover, the Court in *Little* found that the American commander had violated the statute authorizing seizures, thus rendering any discussion of the constitutional question superfluous. See, *e. g.*, *Ashwander* v. *TVA*, 297 U. S. 288, 347 (1936) (Brandeis, J., concurring). And in *Talbot*, the vessel's owners opposed the seizure on purely factual grounds, claiming the vessel was not French. Furthermore, although neither *Little* nor *Talbot* expressly mentions the Fourth Amendment, both opinions adopt a "probable cause" standard, suggesting that the Court may have either applied or been informed by the Fourth Amendment's standards of conduct. *Little*, *supra*, at 179; *Talbot*, *supra*, at 31–32 (declaring that "where there is probable cause to believe the vessel met with at sea is in the condition of one liable to capture, it is lawful to take her, and subject her to the examination and adjudication of the courts").

The Court also relies on a series of cases dealing with the application of criminal procedural protections outside of the United States to conclude that "not every constitutional provision applies to governmental activity even where the United States has sovereign power." *Ante*, at 268. None of these cases, however, purports to read the phrase "the people" as limiting the protections of the Fourth Amendment to those with "sufficient connection" to the United States, and thus none gives content to the majority's analysis. The cases shed no light on the question whether respondent—a citizen of a nonenemy nation being tried in a United States federal court—is one of "the people" protected by the Fourth Amendment.

The majority mischaracterizes *Johnson* v. *Eisentrager*, 339 U. S. 763 (1950), as having "rejected the claim that aliens are entitled to Fifth Amendment rights outside the sovereign territory of the United States." *Ante*, at 269. In *Johnson*, 21 German nationals were convicted of engaging in continued military activity against the United States after the surrender of Germany and before the surrender of Japan in World War II. The Court held that "the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an *alien enemy* engaged in the hostile service of a government at war with the United States." 339 U. S., at 785 (emphasis added). As the Court wrote:

> "It is war that exposes the relative vulnerability of the alien's status. The security and protection enjoyed while the nation of his allegiance remains in amity with the United States are greatly impaired when his nation takes up arms against us. . . . But disabilities this country lays upon the alien who becomes also an enemy are imposed temporarily as an incident of war and not as an incident of alienage." *Id.*, at 771–772.

The Court rejected the German nationals' efforts to obtain writs of habeas corpus not because they were foreign nationals, but because they were enemy soldiers.

The *Insular Cases*, *Balzac* v. *Porto Rico*, 258 U. S. 298 (1922), *Ocampo* v. *United States*, 234 U. S. 91 (1914), *Dorr* v. *United States*, 195 U. S. 138 (1904), and *Hawaii* v. *Mankichi*, 190 U. S. 197 (1903), are likewise inapposite. The *Insular Cases* all concerned whether accused persons enjoyed the protections of certain rights in criminal prosecutions brought by territorial authorities in territorial courts. These cases were limited to their facts long ago, see *Reid* v. *Covert*, 354 U. S., at 14 (plurality opinion) ("[I]t is our judgment that neither the cases nor their reasoning should be given any further expansion"), and they are of no analytical value when a criminal defendant seeks to invoke the Fourth Amendment in a prosecution by the Federal Government in a federal court.[11]

C

The majority's rejection of respondent's claim to Fourth Amendment protection is apparently motivated by its fear that application of the Amendment to law enforcement searches against foreign nationals overseas "could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest." *Ante*, at 273–274. The majority's doomsday scenario—that American Armed Forces conducting a mission to protect our national security with no law enforcement objective "would have to articulate specific facts giving them probable cause to undertake a search or seizure," *ante*, at 274—is fanciful. Verdugo-Urquidez is protected by the Fourth Amendment because our Government, by investigating and prosecuting him, has made him one of "the governed." See *supra*, at 284, 287. Accepting respondent as one of "the governed," however, hardly requires the Court to accept enemy aliens in wartime as among "the governed" entitled to invoke the protection of the Fourth Amendment. See *Johnson* v. *Eisentrager*, *supra*.

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[11] The last of the *Insular Cases* cited by the majority, *Downes* v. *Bidwell*, 182 U. S. 244 (1901), is equally irrelevant. In *Downes*, the Court held that Puerto Rico was not part of "the United States" with respect to the constitutional provision that "all Duties, Imposts and Excises shall be uniform throughout the United States," U. S. Const., Art. I, § 8, cl. 1. 182 U. S., at 249. Unlike the Uniform Duties Clause, the Fourth Amendment contains no express territorial limitations. See n. 7, *supra*.

Moreover, with respect to non-law-enforcement activities not directed against enemy aliens in wartime but nevertheless implicating national security, doctrinal exceptions to the general requirements of a warrant and probable cause likely would be applicable more frequently abroad, thus lessening the purported tension between the Fourth Amendment's strictures and the Executive's foreign affairs power. Many situations involving sensitive operations abroad likely would involve exigent circumstances such that the warrant requirement would be excused. Cf. *Warden* v. *Hayden*, 387 U. S. 294, 298 (1967). Therefore, the Government's conduct would be assessed only under the reasonableness standard, the application of which depends on context. See *United States* v. *Montoya de Hernandez*, 473 U. S. 531, 537 (1985) ("What is reasonable depends upon all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself").

In addition, where the precise contours of a "reasonable" search and seizure are unclear, the Executive Branch will not be "plunge[d] . . . into a sea of uncertainty," *ante*, at 274, that will impair materially its ability to conduct foreign affairs. Doctrines such as official immunity have long protected Government agents from any undue chill on the exercise of lawful discretion. See, *e. g.*, *Butz* v. *Economou*, 438 U. S. 478 (1978). Similarly, the Court has recognized that there may be certain situations in which the offensive use of constitutional rights should be limited. Cf. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U. S. 388, 396 (1971) (precluding suits for damages for violations of the Fourth Amendment where there are "special factors counselling hesitation"). In most cases implicating foreign policy concerns in which the reasonableness of an overseas search or seizure is unclear, application of the Fourth Amendment will not interfere with the Executive's traditional prerogative in foreign affairs because a court will have occasion to decide the constitutionality of such a search only if *the Executive* decides to bring a criminal prosecution and introduce evidence seized abroad. When the Executive decides to conduct a search as part of an ongoing criminal investigation, fails to get a warrant, and then seeks to introduce the fruits of that search at trial, however, the courts must enforce the Constitution.

II

Because the Fourth Amendment governs the search of respondent's Mexican residences, the District Court properly suppressed the evidence found in that search because the officers conducting the search did not obtain a warrant.[12] I cannot agree with JUSTICE BLACKMUN and JUSTICE STEVENS that the Warrant Clause has no application to searches of noncitizens' homes in foreign jurisdictions because American magistrates lack the power to authorize such searches.[13] See *post*, at 297 (BLACKMUN, J., dissenting); *ante*, at 279 (STEVENS, J., concurring in judgment). The Warrant Clause would serve the same primary functions abroad as it does domestically, and I see no reason to distinguish between foreign and domestic searches.

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[12] The District Court found no exigent circumstances that would justify a warrantless search. After respondent's arrest in Mexico, he was transported to the United States and held in custody in southern California. Only after respondent was in custody in the United States did the Drug Enforcement Administration (DEA) begin preparations for a search of his Mexican residences. On the night respondent was arrested, DEA Agent Terry Bowen contacted DEA Special Agent Walter White in Mexico to seek his assistance in conducting the search. Special Agent White contacted Mexican officials the next morning and at 1 p.m. authorized Agent Bowen to conduct the search. A team of DEA agents then drove to Mexico, met with Mexican officials, and arrived at the first of respondent's two residences after dark. 856 F. 2d 1214, 1226 (CA9 1988). The search did not begin until approximately 10 p.m. the day after respondent was taken into custody. App. to Pet. for Cert. 101a. In all that time, particularly when respondent and Agent Bowen were both in the United States and Agent Bowen was awaiting further communications from Special Agent White, DEA agents could easily have sought a warrant from a United States Magistrate.

The primary purpose of the warrant requirement is its assurance of neutrality. As Justice Jackson stated for the Court in *Johnson* v. *United States,* 333 U. S. 10, 13–14 (1948) (footnotes omitted):

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[13] JUSTICE STEVENS concurs in the judgment because he believes that the search in this case "was not 'unreasonable' as that term is used in the first Clause of the Amendment." *Ante*, at 279. I do not understand why JUSTICE STEVENS reaches the reasonableness question in the first instance rather than remanding that issue to the Court of Appeals. The District Court found that, even if a warrant were not required for this search, the search was nevertheless unreasonable. The court found that the search was unconstitutionally general in its scope, as the agents were not limited by any precise written or oral descriptions of the type of documentary evidence sought. App. to Pet. for Cert. 102a. Furthermore, the Government demonstrated no specific exigent circumstances that would justify the increased intrusiveness of searching respondent's residences between 10 p.m. and 4 a.m., rather than during the day. *Id.*, at 101a. Finally, the DEA agents who conducted the search did not prepare contemporaneous inventories of the items seized or leave receipts to inform the residents of the search and the items seized. *Id.*, at 102a. Because the Court of Appeals found that the search violated the Warrant Clause, it never reviewed the District Court's alternative holding that the search was unreasonable even if no warrant were required. Thus, even if I agreed with JUSTICE STEVENS that the Warrant Clause did not apply in this case, I would remand to the Court of Appeals for consideration of whether the search was unreasonable. Barring a detailed review of the record, I think it is inappropriate to draw any conclusion about the reasonableness of the Government's conduct, particularly when the conclusion reached contradicts the specific findings of the District Court.

JUSTICE KENNEDY rejects application of the Warrant Clause not because of the identity of the individual seeking protection, but because of the location of the search. See *ante*, at 278 (concurring opinion) ("[T]he Fourth Amendment's warrant requirement should not apply in Mexico as it does in this country"). JUSTICE KENNEDY, however, never explains why the Reasonableness Clause, as opposed to the Warrant Clause, would not apply to searches abroad.

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

See also *Welsh* v. *Wisconsin,* 466 U. S. 740, 748–749, and n. 10 (1984); *Coolidge* v. *New Hampshire,* 403 U. S. 443, 449 (1971). A warrant also defines the scope of a search and limits the discretion of the inspecting officers. See *New York* v. *Burger,* 482 U. S. 691, 703 (1987); *Marron* v. *United States,* 275 U. S. 192, 196 (1927). These purposes would be served no less in the foreign than in the domestic context.

The Warrant Clause cannot be ignored simply because Congress has not given any United States magistrate authority to issue search warrants for foreign searches. See Fed. Rule Crim. Proc. 41(a). Congress cannot define the contours of the Constitution. If the Warrant Clause applies, Congress cannot excise the Clause from the Constitution by failing to provide a means for United States agents to obtain a warrant. See *Best* v. *United States,* 184 F. 2d 131, 138 (CA1 1950) ("Obviously, Congress may not nullify the guarantees of the Fourth Amendment by the simple expedient of not empowering any judicial officer to act on an application for a warrant"), cert. denied, 340 U. S. 939 (1951).

Nor is the Warrant Clause inapplicable merely because a warrant from a United States magistrate could not "authorize" a search in a foreign country. Although this may be true as a matter of international law, it is irrelevant to our interpretation of the Fourth Amendment. As a matter of United States constitutional law, a warrant serves the same primary function overseas as it does domestically: it assures that a neutral magistrate has authorized the search and limited its scope. The need to protect those suspected of criminal activity from the unbridled discretion of investigating officers is no less important abroad than at home.[14]

III

When our Government conducts a law enforcement search against a foreign national outside of the United States and its territories, it must comply with the Fourth Amendment. Absent exigent circumstances or consent, it must obtain a search warrant from a United States court. When we tell the world that we expect all people, wherever they may be, to abide by our laws, we cannot in the same breath tell the world that our law enforcement officers need not do the same. Because we cannot expect others to respect our laws until we respect our Constitution, I respectfully dissent.

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[14] The United States Government has already recognized the importance of these constitutional requirements by adopting a warrant requirement for certain foreign searches. Department of the Army regulations state that the Army must seek a "judicial warrant" from a United States court whenever the Army seeks to intercept the wire or oral communications of a person not subject to the Uniform Code of Military Justice outside of the United States and its territories. Army Regulation 190–53 ¶2–2(b) (1986). Any request for a judicial warrant must be supported by sufficient facts to meet the probable-cause standard applied to interceptions of wire or oral communications in the United States, 18 U. S. C. § 2518(3). Army Regulation 190–53 ¶2–2(b). If the foreign country in which the interception will occur has certain requirements that must be met before other nations can intercept wire or oral communications, an American judicial warrant will not alone authorize the interception under international law. Nevertheless, the Army has recognized that an order from a United States court is necessary under domestic law. By its own regulations, the United States Government has conceded that although an American warrant might be a "dead letter" in a foreign country, a warrant procedure in an American court plays a vital and indispensable role in circumscribing the discretion of agents of the Federal Government.

JUSTICE BLACKMUN, dissenting.

I cannot accept the Court of Appeals' conclusion, echoed in some portions of JUSTICE BRENNAN's dissent, that the Fourth Amendment governs every action by an American official that can be characterized as a search or seizure. American agents acting abroad generally do not purport to exercise *sovereign* authority over the foreign nationals with whom they come in contact. The relationship between these agents and foreign nationals is therefore fundamentally different from the relationship between United States officials and individuals residing within this country.

I am inclined to agree with JUSTICE BRENNAN, however, that when a foreign national is held accountable for purported violations of United States criminal laws, he has effectively been treated as one of "the governed" and therefore is entitled to Fourth Amendment protections. Although the Government's exercise of *power* abroad does not ordinarily implicate the Fourth Amendment, the enforcement of domestic criminal law seems to me to be the paradigmatic exercise of sovereignty over those who are compelled to obey. In any event, as JUSTICE STEVENS notes, *ante*, at 279, respondent was lawfully (though involuntarily) within this country at the time the search occurred. Under these circumstances I believe that respondent is entitled to invoke protections of the Fourth Amendment. I agree with the Government, however, that an American magistrate's lack of power to authorize a search abroad renders the Warrant Clause inapplicable to the search of a noncitizen's residence outside this country.

The Fourth Amendment nevertheless requires that the search be "reasonable." And when the purpose of a search is the procurement of evidence for a criminal prosecution, we have consistently held that the search, to be reasonable, must be based upon probable cause. Neither the District Court nor the Court of Appeals addressed the issue of probable cause, and I do not believe that a reliable determination could be made on the basis of the record before us. I therefore would vacate the judgment of the Court of Appeals and remand the case for further proceedings.

Syllabus

BLYSTONE *v.* PENNSYLVANIA

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

No. 88-6222. Argued October 10, 1989—Decided February 28, 1990

After convicting petitioner of robbery, first-degree murder, and related crimes, a Pennsylvania jury—having found as an aggravating circumstance that petitioner committed a killing while in the perpetration of a felony and having found that no mitigating circumstances existed—sentenced him to death. The State Supreme Court affirmed, rejecting petitioner's argument that the State's death penalty statute—which requires a sentence of death if a jury unanimously finds at least one aggravating circumstance and no mitigating circumstances or one or more aggravating circumstances that outweigh any mitigating ones—is unconstitutional because it mandates a death sentence based on the outcome of the weighing process.

Held: The Pennsylvania death penalty statute, and petitioner's sentence under it, comport with this Court's decisions interpreting the Eighth Amendment. The statute satisfies the requirement that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence since it does not unduly limit the types of mitigating evidence that may be considered. Nor is the statute impermissibly mandatory. Death is not automatically imposed upon conviction for certain types of murder, but is imposed only after a determination that the aggravating circumstances outweigh the mitigating ones present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances. This is sufficient under *Lockett* v. *Ohio*, 438 U. S. 586, and *Penry* v. *Lynaugh*, 492 U. S. 302. *Woodson* v. *North Carolina*, 428 U. S. 280, and *Roberts* v. *Louisiana*, 428 U. S. 325, distinguished. Petitioner's argument that the mandatory feature of his jury instructions precluded the jury from considering whether the severity of his aggravating circumstance warranted the death sentence is rejected. The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that such circumstances be further refined or weighed by a jury. Also rejected is petitioner's argument that the mandatory aspect of his jury instructions—where the instructions additionally stated that the jury was allowed to consider, *inter alia,* whether petitioner was affected by "extreme" mental or emotional disturbance, whether he was "substantially" impaired from appreciating his conduct, or whether he acted under "extreme" duress—foreclosed the jury's consideration of lesser degrees of disturbance, impairment, or duress. The judge clearly stated that these were merely items that the jury could consider, and that it was also entitled to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense," an instruction that fully complies with the requirements of *Lockett*, *supra*, and *Penry*, *supra*. That other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice, since within the constitutional limits defined by this Court's cases, the States enjoy their traditional latitude to prescribe the method of punishment for those who commit murder. Pp. 303–309.

519 Pa. 450, 549 A. 2d 81, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in all but Part IV of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 309.

Paul R. Gettleman argued the cause for petitioner. With him on the briefs was *Stefan Presser*.

Ernest D. Preate, Jr., Attorney General of Pennsylvania, argued the cause for respondent. With him on the brief were *Ronald Eisenberg*, *Hugh J. Burns, Jr.*, *Ewing D. Newcomer*, and *Gaele McLaughlin Barthold*, Special Deputy Attorneys General, and *Robert A. Graci*, Chief Deputy Attorney General.*

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*A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Richard B. Iglehart*, Chief Assistant Attorney General, *Arnold O. Overoye*, Senior Assistant Attorney General, and *Edmund D. McMurray*, *Dane R. Gillette*, and *Ward A. Campbell*, Deputy Attorneys General, *Robert K. Corbin*, Attorney General of Arizona, *John J. Kelly*, Chief State's Attorney of Connecticut, *James T. Jones*, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Marc Racicot*, Attorney General of Montana, *Brian McKay*, Attorney General of Nevada, *John P. Arnold*, Attorney General of New Hampshire, *Lacy H. Thornburg*, Attorney General of North Carolina, *T. Travis Medlock*, Attorney General of South Carolina, *Michael Burson*, Attorney General of Tennessee, *R. Paul Van Dam*, Attorney General of Utah, and *Joseph P. Meyer*, Attorney General of Wyoming.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

A Pennsylvania jury sentenced petitioner Scott Wayne Blystone to death after finding him guilty of robbing and murdering a hitchhiker who was unlucky enough to have accepted a ride in his car. Petitioner challenges his sentence on the ground that the State's death penalty statute is unconstitutional because it requires the jury to impose a sentence of death if, as in this case, it finds at least one aggravating circumstance and no mitigating circumstances. We hold that the Pennsylvania death penalty statute, and petitioner's sentence under it, comport with our decisions interpreting the Eighth Amendment to the United States Constitution.

On a September night in 1983, Dalton Charles Smithburger, Jr., an individual characterized at trial as possessing a learning disability, was attempting to hitch a ride along a Pennsylvania road. Petitioner, who was driving an auto carrying his girlfriend and another couple, observed Smithburger and announced: "I am going to pick this guy up and rob him, okay . . . ?" His friends acquiesced in the idea. Once petitioner had Smithburger in the car, he asked him if he had any money for gas. Smithburger responded that he only had a few dollars and began searching a pocket for money. Dissatisfied, petitioner pulled out a revolver, held it to Smithburger's head, and demanded that Smithburger close his eyes and put his hands on the dash. Petitioner then pulled off the road and ordered Smithburger out of the car and into a nearby field. After searching his victim at gunpoint and recovering $13, petitioner told Smithburger to lie face down in the field. He later said to a friend: "'He [Smithburger] was so scared. When I was searching him, his body was shaking.'" 519 Pa. 450, 490, 549 A. 2d 81, 100 (1988).

Petitioner then ordered his victim not to move, and crept back to the car to tell his companions he was going to kill Smithburger. Petitioner returned to the field where, paralyzed by fright, Smithburger remained with his face to the ground. Petitioner asked his victim what kind of car he had been in. Smithburger responded with the wrong answer—he accurately described the car as green with a wrecked back end. Petitioner then said "'goodbye'" and discharged six bullets into the back of Smithburger's head. During a subsequent conversation with a friend, petitioner was recorded on a concealed device "bragging in vivid and grisly detail of the killing of that unlucky lad." *Id.*, at 457, 549 A. 2d, at 84. In response to a query during the conversation as to whether petitioner dreamed about, or felt anything from, the murder, petitioner stated: "'We laugh about it. . . . [I]t gives you a realization that you can do it. . . . You can walk and blow somebody's brains out and you know that you can get away with it. It gives you a feeling of power, self-confidence . . . .'" *Id.*, at 489–490, 549 A. 2d, at 100.

Petitioner was charged with and convicted of first-degree murder, robbery, criminal conspiracy to commit homicide, and criminal conspiracy to commit robbery. The same jury that convicted petitioner found as an aggravating circumstance that petitioner "committed a killing while in the perpetration of a felony." 42 Pa. Cons. Stat. § 9711(d)(6) (1988). The jury found that no mitigating circumstances existed, and accordingly sentenced petitioner to death pursuant to the Pennsylvania death penalty statute which provides that "[t]he verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." § 9711(c)(1)(iv). On direct appeal to the Supreme Court of Pennsylvania, petitioner argued that the death penalty statute was unconstitutional because it mandated a sentence of death based on the outcome of the weighing process. The court summarily rejected this argument, see 519 Pa., at 473, 549 A. 2d, at 92, noting that it had been expressly refuted in its decision in *Commonwealth*

v. *Peterkin*, 511 Pa. 299, 326–328, 513 A. 2d 373, 387–388 (1986), cert. denied, 479 U. S. 1070 (1987). In *Peterkin*, the court reasoned that the statute properly accommodated the concerns of *Furman* v. *Georgia*, 408 U. S. 238 (1972), that jury discretion be channeled to avoid arbitrary and capricious capital sentencing, and *Lockett* v. *Ohio*, 438 U. S. 586 (1978), that a capital jury be allowed to consider all relevant mitigating evidence. 511 Pa., at 326–328, 513 A. 2d, at 387–388. We granted certiorari, 489 U. S. 1096 (1989), to decide whether the mandatory aspect of the Pennsylvania death penalty statute renders the penalty imposed upon petitioner unconstitutional because it improperly limited the discretion of the jury in deciding the appropriate penalty for his crime. We now affirm.

The constitutionality of a death penalty statute having some "mandatory" aspects is not a novel issue for this Court. In *Jurek* v. *Texas*, 428 U. S. 262 (1976), we upheld a statute requiring the imposition of a death sentence if the jury made certain findings against the defendant beyond the initial conviction for murder. See *id.*, at 278 (WHITE, J., concurring in judgment). A majority of the Court believed that the Texas sentencing scheme at issue in *Jurek* cured the constitutional defect identified in *Furman*—namely, that unguided juries were imposing the death penalty in an inconsistent and random manner on defendants. See *Furman, supra,* at 309–310 (Stewart, J., concurring). Thus, by suitably directing and limiting a sentencing jury's discretion "so as to minimize the risk of wholly arbitrary and capricious action," *Gregg* v. *Georgia*, 428 U. S. 153, 189 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.), the Texas death penalty scheme was found to pass constitutional muster. See *Jurek*, 428 U. S., at 276.[1]

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[1] Only three Members of the Court expressly relied on the mandatory nature of the Texas sentencing scheme as one reason why it passed muster under *Furman*. See *Jurek*, 428 U. S., at 278 (WHITE, J., joined by Burger, C. J. and REHNQUIST, J., concurring in judgment). While Justices

It was also thought significant that the Texas sentencing scheme allowed the jury to consider relevant mitigating evidence. "A jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Id.*, at 271 (opinion of Stewart, Powell, and STEVENS, JJ.). On the same day that *Jurek* was decided, the Court struck down two capital sentencing schemes largely because they *automatically* imposed a sentence of death upon an individual convicted of certain murders, without allowing "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325, 333–334 (1976) (plurality opinion); see also *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion) ("The mandatory death penalty statute in *Woodson* was held invalid because it permitted *no* consideration of relevant facets of the character and record of the individual offender or the circumstances of the particular offense") (emphasis in original; quotation omitted).

In *Lockett*, the Court provided further guidance on the nature of "relevant" mitigating circumstances, concluding that a sentencer must be allowed to consider, "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Ibid.* (emphasis in original; footnote omitted). Last Term, we elaborated on this principle, holding that "the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circum-

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Stewart, Powell, and STEVENS did not explicitly rely on the mandatory character of that scheme in upholding it, those Justices certainly did not believe the mandatory language posed any constitutional difficulties. See generally *id.*, at 268–277.

stances of the crime." *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989).

We think that the Pennsylvania death penalty statute satisfies the requirement that a capital sentencing jury be allowed to consider and give effect to all relevant mitigating evidence. Section 9711 does not limit the types of mitigating evidence which may be considered, and subsection (e) provides a jury with a nonexclusive list of mitigating factors which may be taken into account—including a "catchall" category providing for the consideration of "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." See 42 Pa. Cons. Stat. § 9711(e)(8) (1988).[2] Nor is the statute impermissibly "mandatory" as that term was understood in *Woodson* or *Roberts*. Death is not automatically imposed upon conviction for certain types of murder. It is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances. This is sufficient under *Lockett* and *Penry*.[3]

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[2] The Pennsylvania Supreme Court has construed § 9711(e) to allow consideration of *any* relevant mitigating evidence, even that falling outside the catchall provision of subsection (e)(8). *Commonwealth* v. *Holcomb*, 508 Pa. 425, 470, n. 26, 498 A. 2d 833, 856, n. 26 (1985) (plurality opinion), cert. denied, 475 U. S. 1150 (1986); see also *Commonwealth* v. *Fahy*, 512 Pa. 298, 315–316, 516 A. 2d 689, 698 (1986).

[3] The dissent states that our discussion of the facial validity of the Pennsylvania statute under *Penry* and *Lockett* is irrelevant because "[w]e did not grant certiorari to determine if the statute allows sufficient consideration of mitigating circumstances as required by *Lockett*. We granted certiorari to consider whether a State may mandate the death penalty when the jury finds no mitigating circumstances." *Post*, at 316, n. 5. This statement is in error. The question presented reads as follows: "Whether the mandatory nature of the Pennsylvania death penalty statute renders said statute facially unconstitutional or renders the death penalty imposed upon petitioner unconstitutional because it improperly limits the full discretion the sentencer must have in deciding the appropriate penalty for a

Petitioner challenges the statute as it was applied in his particular case. This challenge essentially consists of a claim that his sentencing proceeding was rendered "unreliable" by the mandatory aspect of § 9711 for two reasons. See *Woodson*, *supra*, at 305 (there is a "need for reliability in the determination that death is the appropriate punishment in a specific case") (plurality opinion). First, petitioner asserts that the mandatory feature of his jury instructions—derived, of course, from the statute—precluded the jury from evaluating the weight of the particular aggravating circumstance found in his case. Second, petitioner contends that the mandatory feature of the sentencing instructions unconstitutionally limited the jury's consideration of unenumerated mitigating circumstances. We address these arguments in turn.

At sentencing, petitioner's jury found one aggravating circumstance present in this case—that petitioner committed a killing while in the perpetration of a robbery. No mitigating circumstances were found.[4] Petitioner contends that the mandatory imposition of death in this situation violates the Eighth Amendment requirement of individualized sentencing since the jury was precluded from considering whether the severity of his aggravating circumstance warranted the death sentence. We reject this argument. The presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amend-

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particular defendant." Pet. for Cert. 2. The jury's ability to consider mitigating evidence is indeed germane to this question.

[4] After receiving repeated warnings from the trial judge, and contrary advice from his counsel, petitioner decided not to present any proof of mitigating evidence during his sentencing proceedings. Asked to explain this decision by the trial judge, petitioner responded: "I don't want anybody else brought into it." App. 8. Nonetheless, the jury was specifically instructed that it should consider any mitigating circumstances which petitioner had proved by a preponderance of the evidence, and in making this determination the jury should consider any mitigating evidence presented at trial, including that presented by either side during the guilt phase of the proceedings. *Id.*, at 13.

ment does not require that these aggravating circumstances be further refined or weighed by a jury. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988) ("The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion"). The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence.[5] In petitioner's case the jury was specifically instructed to consider, as mitigating evidence, any "matter concerning the character or record of the defendant, or the circumstances of his offense." App. 12–13. This was sufficient to satisfy the dictates of the Eighth Amendment.

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[5] Petitioner's reliance on *Sumner* v. *Shuman*, 483 U. S. 66 (1987), is misplaced. There we held that a statute mandating the death penalty for a prison inmate convicted of murder while serving a life sentence without possibility of parole violated the Eighth and Fourteenth Amendments. Although noting that "[p]ast convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder," *id.*, at 81, we recognized that "the inferences to be drawn concerning an inmate's character and moral culpability may vary depending on the nature of the past offense." The sentencing scheme involved in that case, however, did not provide for the consideration of any mitigating circumstances. *Id.*, at 67–68, n. 1.

The dissent attempts to undermine our reliance on *Jurek* v. *Texas*, 428 U. S. 262 (1976), by arguing that the requirement of individualized sentencing was fulfilled under the Texas death penalty statute in a way not allowed by the Pennsylvania scheme through the jury's consideration of special findings required to be made before death could be imposed. *Post*, at 320–323. The dissent ignores the fact that the three-Justice opinion in *Jurek* concluded that the Texas statute fulfilled the requirement of individualized sentencing precisely because one of the special findings had been construed by Texas courts to permit the consideration of mitigating evidence. *Jurek*, *supra*, at 272 (opinion of Stewart, Powell and STEVENS, JJ.) ("Thus, the constitutionality of the Texas procedures turns on whether the enumerated questions allow consideration of particularized mitigating factors"). Nowhere in that opinion was it implied that the mandatory feature of the Texas statute was constitutional only because a jury could still weigh other factors under a particular construction of the special findings when it found no mitigating circumstances.

Next, petitioner maintains that the mandatory aspect of his sentencing instructions foreclosed the jury's consideration of certain mitigating circumstances. The trial judge gave the jury examples of mitigating circumstances that it was entitled to consider, essentially the list of factors contained in § 9711(e). Among these, the judge stated that the jury was allowed to consider whether petitioner was affected by an "extreme" mental or emotional disturbance, whether petitioner was "substantially" impaired from appreciating his conduct, or whether petitioner acted under "extreme" duress. Petitioner argues that these instructions impermissibly precluded the jury's consideration of lesser degrees of disturbance, impairment, or duress. This claim bears scant relation to the mandatory aspect of Pennsylvania's statute, but in any event we reject it. The judge at petitioner's trial made clear to the jury that these were merely items it could consider, and that it was also entitled to consider "any other mitigating matter concerning the character or record of the defendant, or the circumstances of his offense." App. 12–13. This instruction fully complied with the requirements of *Lockett* and *Penry*.

Three Terms ago, in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987), we summarized the teachings of the Court's death penalty jurisprudence:

> "In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense

> prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Id.*, at 305–306.

We think petitioner's sentence under the Pennsylvania statute satisfied these requirements. The fact that other States have enacted different forms of death penalty statutes which also satisfy constitutional requirements casts no doubt on Pennsylvania's choice. Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join except as to Part IV, dissenting.

The hallmark of our Eighth Amendment jurisprudence is that because the "penalty of death is qualitatively different from a sentence of imprisonment," *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), capital punishment may not be imposed unless the sentencer makes an individualized determination that death is the appropriate sentence for a particular defendant. This Court has repeatedly invoked this principle to invalidate mandatory death penalty statutes for even the most egregious crimes. See *Sumner* v. *Shuman*, 483 U. S. 66, 85 (1987) (murder committed by inmate serving life sentence); *Roberts* v. *Louisiana*, 431 U. S. 633, 637 (1977) (murder of police officer); *Roberts* v. *Louisiana*, 428 U. S. 325, 333 (1976) (plurality opinion) (all first-degree murders); *Woodson*, *supra* (same). Today, for the first time, the Court upholds a statute containing a mandatory provision that gives the legislature rather than the jury the ultimate decision whether the death penalty is appropriate in a particular set of circumstances. Such a statute deprives the defendant of the type of individualized sentencing hearing required by the Eighth Amendment. I respectfully dissent.

I

After a defendant is convicted of first-degree murder in Pennsylvania, the court must hold a separate sentencing hearing at which the jury determines whether the death penalty is warranted. 42 Pa. Cons. Stat. § 9711(a) (1988). The jury considers the aggravating circumstances that are listed in the statute.[1] In addition, the jury considers specific enu-

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[1] The aggravating circumstances are as follows:

"(1) The victim was a fireman, peace officer, or other public servant concerned in official detention . . . , who was killed in the performance of his duties.

"(2) The defendant paid or was paid by another person or had contracted to pay or be paid by another person or had conspired to pay or be paid by another person for the killing of the victim.

"(3) The victim was being held by the defendant for ransom or reward, or was held as a shield or hostage.

"(4) The death of the victim occurred while the defendant was engaged in the hijacking of an aircraft.

"(5) The victim was a prosecution witness to a murder or other felony committed by the defendant and was killed for the purpose of preventing his testimony against the defendant in any grand jury or criminal proceeding involving such offenses.

"(6) The defendant committed the killing while in the perpetration of a felony.

"(7) In the commission of the offense the defendant knowingly created a grave risk of death to another person in addition to the victim of the offense.

"(8) The offense was committed by means of torture.

"(9) The defendant has a significant history of felony convictions involving the use or threat of violence to the person.

"(10) The defendant has been convicted of another Federal or State offense committed either before or at the time of the offense at issue, for which a sentence of life imprisonment or death was imposable or the demerated mitigating circumstances and "any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense." § 9711(e). The State must prove the existence of aggravating circumstances beyond a reasonable doubt, and the defendant must prove the existence of mitigating circumstances by a preponderance of the evidence. § 9711(c)(1)(iii). The statute provides that "[t]he verdict *must* be a sentence of death if the jury unanimously finds at least one aggravating circumstance specified in subsection (d) and no mitigating circumstance." § 9711(c)(1)(iv) (emphasis added).[2] The statute therefore deprives the jury of any sentencing discretion once it has found one aggravating circumstance but no mitigating circumstances; the jury may not consider whether the aggravating circumstance, by itself, justifies the imposition of the most extreme sanction available to society.

This case illustrates the effect of the mandatory provision of the statute. The jury found as an aggravating circumstance that petitioner had committed murder during a $13 robbery. § 9711(d)(6). But petitioner presented no evidence of mitigating circumstances and the jury found none. App. 19. The jury was told that in such a situation, it was not allowed to make the ultimate decision whether the death penalty was justified. The judge instructed the jury that once it found "an aggravating circumstance and no mitigating

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fendant was undergoing a sentence of life imprisonment for any reason at the time of the commission of the offense.

"(11) The defendant has been convicted of another murder, committed either before or at the time of the offense at issue.

"(12) The defendant has been convicted of voluntary manslaughter . . . committed either before or at the time of the offense at issue." 42 Pa. Cons. Stat. § 9711(d) (1988).

[2] The statute also provides that "[t]he verdict must be a sentence of death . . . if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." § 9711(c)(1)(iv). Since the jury found no mitigating circumstances in this case, petitioner challenges the constitutionality of only the first part of the provision.

circumstances, *it is your duty to return a verdict of death.*" *Id.*, at 11 (emphasis added); see *id.*, at 14 ("Your verdict *must* be a sentence of death if you unanimously find at least one aggravating circumstance and no mitigating circumstances") (emphasis added).[3]

The prosecutor emphasized that each juror had sworn an oath to follow the law and that, in this case, the law mandated the death penalty:

> "Under the law, if you have an aggravating circumstance and no mitigating circumstances, it is your *duty* to impose the death penalty . . . so each of you were asked last week when we questioned you whether or not, under the appropriate circumstances, you could impose the death penalty and each of you replied that you could. Each of you replied that you would follow the law, and each of you replied that whatever your duty was, you would follow it." *Id.*, at 23 (emphasis added).

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[3] Nor did the instructions on mitigating evidence indicate that the jury was free to choose a life sentence even if it did not find any mitigating circumstances. The trial judge made no attempt to define the concept of mitigation for the jury. When the jury pressed for a definition of mitigation, the judge stated that "[t]he Legislature has determined what constitutes mitigating circumstances" and proceeded to list the statutory mitigating factors. App. 16. When pressed further for a definition of the last mitigating circumstance—"any other evidence of mitigation concerning the character of the defendant and the circumstances of his offense"—the judge said, "[t]his is pretty broad and allows you a great latitude in determining what you might consider to be a mitigating circumstance." *Id.*, at 17. The trial judge did, however, emphasize that the defendant was required to prove mitigating factors by a preponderance of the evidence. See *id.*, at 12 ("[I]f you find that the evidence of mitigation is greater than the other way by a preponderance of the evidence, which means simply to exceed in weight, then you would make a finding of mitigat[ion]"). However, because petitioner had not presented any affirmative evidence of mitigation, the judge stressed that the evidence "should be . . . something that you can draw from the record of this case as to his character or the record of the defendant or the circumstances of his offense." *Id.*, at 17.

Indeed, the prosecutor argued that because the jury had already found an aggravating circumstance by finding petitioner guilty of robbery, the statute mandated that the death penalty be imposed unless the defendant proved at least one mitigating circumstance.

> "Our law doesn't permit the jury to impose the death penalty or impose a life sentence as they feel it should be, but rather there are certain specific times when the death penalty should be imposed and there are certain specific times when it should not be imposed. The court touched upon it and told you of aggravating and mitigating circumstances. The aggravating circumstance in this case is that this defendant . . . committed a killing in the perpetration of a felony. The felony in this case was the robbery. You have already made a determination by your verdict that this defendant was guilty of that robbery, so you have the aggravating circumstance. It is already proven and you already believed it. . . . You must determine from the evidence presented in this Courtroom whether or not there are any mitigating circumstances; if not, you must follow the law and impose the death penalty." *Id.*, at 22–24.

Hence, both the judge and the prosecutor emphasized that if the jury failed to find any mitigating factors, the legislature had determined that death was the appropriate sentence.

II

The majority does not dispute this description of the Pennsylvania statute or its application in this case. Rather, the majority holds that "the Eighth Amendment does not require that . . . aggravating circumstances be further refined or weighed by a jury. . . . The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Ante*, at 306–307. That the majority cites no case to support this extraordinary conclusion is no surprise; careful analysis of our cases compels the conclusion that a jury must be able to consider the weight of *both* the aggravating *and* mitigating circumstances when choosing whether to impose a death sentence.

A

The Pennsylvania Legislature's delineation of 12 aggravating circumstances represents an effort to comply with our command that "[b]ecause of the uniqueness of the death penalty, . . . it [may] not be imposed under sentencing procedures that creat[e] a substantial risk that it [will] be inflicted in an arbitrary and capricious manner." *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (citing *Furman* v. *Georgia*, 408 U. S. 238 (1972)). In *Furman*, the Court held that vesting the sentencer with unbridled discretion to determine whether or not to impose the death penalty resulted in a system in which there was no objective way to distinguish between defendants who received the death penalty and those who did not. See *id.*, at 309–310 (Stewart, J., concurring) (death sentences at issue were "cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed"); *id.*, at 313 (WHITE, J., concurring) ("[T]here is no meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not"). In *Gregg*, *supra*, however, the Court held that a State may impose the death penalty if the State adequately "guides" the sentencer's discretion in determining the appropriate punishment. 428 U. S., at 195 (joint opinion of Stewart, Powell, and STEVENS, JJ.); *id.*, at 222 (WHITE, J., concurring in judgment). Thus, the Court has held that a State must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant* v. *Stephens*, 462 U. S. 862, 877 (1983). The legislature may narrow the death-eligible class at the guilt stage by defining the capital murder statute narrowly, see *Lowenfield* v. *Phelps*, 484 U. S. 231, 244 (1988); *Jurek* v. *Texas*, 428 U. S. 262, 270 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), or at the sentencing stage by requiring the sentencer to find "aggravating factors" that objectively distinguish the murder from all other murders. *Godfrey* v. *Georgia*, 446 U. S. 420, 428–429 (1980) (plurality opinion).

At the same time, however, the Court has recognized that the Eighth Amendment imposes a limit on a State's ability to "guide" the sentencer's discretion. On the same day that the Court upheld three death penalty statutes that "guided" the jury's discretion in imposing this sentence,[4] the Court invalidated two mandatory death penalty statutes. *Woodson* v. *North Carolina*, 428 U. S. 280 (1976); *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). The *Woodson* plurality rejected the argument that *Furman* required removal of *all* discretion from the sentencer, holding that any consistency obtained by a mandatory statute would be arbitrary because the consistency would not take into account the individual circumstances of the defendant and the crime. *Woodson*, *supra*, at 304. See also *Eddings* v. *Oklahoma*, 455 U. S. 104, 112 (1982) ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule . . . recognizes that a consistency produced by ignoring individual differences is a false consistency"). A mandatory death penalty statute treats "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Ibid.* Thus, the Court held that the "fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Ibid.* (citation omitted). See also *Sumner*, 483 U. S., at 85; *Roberts*, 431 U. S., at 637.

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[4] *Gregg* v. *Georgia*, 428 U. S. 153 (1976); *Proffitt* v. *Florida*, 428 U. S. 242 (1976); *Jurek* v. *Texas*, 428 U. S. 262 (1976).

Woodson and its progeny are distinguishable from this case because the Pennsylvania statute allows the jury to consider mitigating circumstances. But once a Pennsylvania jury finds that no mitigating circumstances are proved by a preponderance of the evidence, it is required to impose the death penalty. The mandatory provision of the Pennsylvania statute may be effective in a smaller set of cases than the North Carolina statute at issue in *Woodson*. Nevertheless, the effect of the mandatory provision in both statutes is the same: it substitutes a legislative judgment about the severity of a crime for a jury's determination that the death penalty is appropriate for the individual.[5]

B

The majority is unconcerned that in this category of cases the mandatory provision deprives the defendant of an individualized sentencing determination. The nature of the individualized determination required by *Woodson* is derived from this Court's recognition that the decision to impose the death penalty must reflect a reasoned moral judgment about the defendant's actions and character in light of all the circumstances of the offense and the defendant's background. See, *e. g., Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989); *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'CONNOR, J., concurring). Just as a jury must be free to consider and weigh mitigating circumstances as independently relevant to the defendant's moral culpability, see *Penry*, *supra*, at 319, a jury must also be able to consider and weigh the severity of each aggravating circumstance. The weight of an aggravating circumstance depends on the seriousness of the crime—a significant aspect of the defendant's moral culpability. Thus, a reasoned moral response to the defendant's conduct requires the consideration of the significance of both aggravating and mitigating factors. "[I]n the end it is the jury that must make the difficult, *individualized* judgment as to whether the defendant deserves the sentence of death." *Turner* v. *Murray*, 476 U. S. 28, 34 (1986) (opinion of WHITE, J.) (emphasis added); see also *Zant*, 462 U. S., at 879 ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime") (emphasis in original).[6]

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[5] For this reason, the Court's discussion of the facial validity of the statute under *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), and *Lockett* v. *Ohio*, 438 U. S. 586 (1978), is irrelevant. *Ante*, at 305. We did not grant certiorari to determine if the statute allows sufficient consideration of mitigating circumstances as required by *Lockett*. We granted certiorari to consider whether a State may mandate the death penalty when the jury finds no mitigating circumstances. The jury's ability to consider mitigating evidence is not germane to the question presented.

The majority cites only *Lowenfield* v. *Phelps*, 484 U. S. 231 (1988), for its conclusion that the jury need not consider the weight of the aggravating circumstance before imposing the death sentence. In *Lowenfield*, the Court upheld the Louisiana death penalty statute under which a jury could impose a death sentence even if the only aggravating factor found duplicated an element of the offense of capital murder.

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[6] The State argues that allowing the jury to consider the weight of the aggravating circumstance will result in the type of unfettered discretion condemned in *Furman*. This argument was explicitly rejected when the Court upheld the Georgia death penalty statute even though the sentencer was given complete discretion to impose a life sentence after finding an aggravating cirumstance. See *Zant*, 462 U. S., at 875; *Gregg*, *supra*, at 199 (joint opinion of Stewart, Powell, and STEVENS, JJ.). As the Court noted in *Zant*, "specific standards for balancing aggravating against mitigating circumstances are not constitutionally required." *Zant*, *supra*, at 876, n. 13. Allowing the jury to weigh the aggravating circumstance as a means of making an individualized sentencing determination no more permits the jury to exercise unbridled discretion than allowing the consideration of mitigating circumstances. *Woodson* held that an individualized determination that the death sentence is appropriate does not violate *Furman*. *Woodson* v. *North Carolina*, 428 U. S. 280, 303 (1976) (plurality opinion).

Id., at 244. The sole question the Court addressed was whether such an aggravating circumstance sufficiently narrowed the class of death-*eligible* defendants. As the majority notes today, *ante*, at 307, *Lowenfield* held that "[t]he use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." 484 U. S., at 244. Nothing in *Lowenfield* suggests that a State may preclude a jury from weighing the strength of the aggravating factor.[7] As the majority fails to recognize, under the Pennsylvania statute an aggravating circumstance does much more than "channel" the jury's discretion: in the absence of mitigating factors, it *mandates* the death penalty.

This Court has never held that a legislature may mandate the death sentence for any category of murderers. Instead, a legislature's role must be limited to the definition of the class of death-*eligible* defendants. A legislature does not, and indeed cannot, consider every possible fact pattern that technically will fall within an aggravating circumstance. Hence, the definition of an aggravating circumstance provides a basis for distinguishing crimes only on a *general* level; it does not embody the type of reasoned moral judgment required to justify the imposition of the death penalty. See *Sumner* v. *Shuman*, *supra*, at 78 (legislative judgment does not "provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any *particular* case") (emphasis added). The Pennsylvania statute provides a stark example of this constitutional flaw. It permits the jury to find an aggravating circumstance if the killing was committed in the course of a felony. 42 Pa. Cons. Stat. § 9711(d)(6) (1988). A variety of murders fit under this aggravating circumstance. Since the Pennsylvania Supreme Court has interpreted this aggravating circumstance to include *nonviolent* felonies, *Commonwealth* v. *Holcomb*, 508 Pa. 425, 498 A. 2d 833 (1985), the aggravating circumstance covers a very wide range of cases. A jury, however, likely would draw a different inference about the culpability of the defendant—and therefore the propriety of the death sentence—if the murder were committed during a rape rather than (as here) during a $13 robbery. The majority today allows the legislature to preclude a jury from considering such factors in deciding whether to impose death.[8]

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[7] The Louisiana statute provides: "'A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.'" 484 U. S., at 242 (quoting La. Code Crim. Proc. Ann., Art. 905.3 (West 1984)). The Louisiana law permitted the jury to consider the weight of the aggravating circumstance in a way that the Pennsylvania statute does not.

Such a conclusion flies in the face of our reasoning in *Sumner* v. *Shuman*, 483 U. S. 66 (1987). In *Sumner*, we invalidated a statute that mandated death for a prisoner who committed murder while already serving a life term. Although the Court acknowledged the legislature's power to determine that the crime was sufficiently serious to make the defendants *eligible* for the death penalty, the Court held that the legislature had no power to conclude that the sole fact that the defendant was serving a life sentence justified the death penalty in every such case. *Id.*, at 78–81. As the Court explained:

> "Past convictions of other criminal offenses can be considered as a valid aggravating factor in determining whether a defendant deserves to be sentenced to death for a later murder, but the inferences to be drawn con-

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[8] The State argues that Pennsylvania law allows the jury to consider the lack of severity of an aggravating factor as a *mitigating* factor. Such a counterintuitive argument is without merit. It is preposterous to assume that a jury that is instructed that a certain fact—*e. g.*, the murder was committed during a robbery—is the *reason* to impose the death penalty will simultaneously believe it can consider that same fact as a reason *not* to impose a death sentence. At the very least, a jury would not understand that without an instruction.

> cerning an inmate's character and moral culpability may vary depending on the nature of the past offense. The circumstances surrounding any past offense may vary widely as well. Without consideration of the nature of the predicate life-term offense and the circumstances surrounding the commission of that offense, the label 'life-term inmate' reveals little about the inmate's record or character. Even if the offense was first-degree murder, whether the defendant was the primary force in that incident, or a nontriggerman . . . , may be relevant to both his criminal record and his character. Yet under the mandatory statute, all predicate life-term offenses are given the same weight." *Id.*, at 81 (footnote omitted).

The majority dismisses *Sumner* as inapposite because the sentencing scheme in that case did not allow for the consideration of mitigating evidence. *Ante*, at 306, n. 4. But the discussion quoted above clearly relates to a legislature's power to define aggravating circumstances and precedes any discussion of the significance of mitigating circumstances. In fact, we went on to state that "[n]ot only [do the defendant's prior convictions] serve as incomplete indicators of the circumstances surrounding the murder and of the defendant's criminal record, but also they say nothing of [mitigating circumstances]." 483 U. S., at 81–82. In *Sumner*, the Court invalidated the statute because it precluded the jury from considering mitigating factors *and* because it prevented the jury from determining whether certain crimes were serious enough to require the death penalty.

C

The Court's suggestion, *ante*, at 303, that *Jurek* v. *Texas*, 428 U. S. 262 (1976), supports its holding in this case reveals a fundamental misunderstanding of petitioner's claim.[9] Although both the Texas and Pennsylvania statutes contain mandatory language, the Texas statute upheld in *Jurek* does not deprive the jury of its ability to determine the propriety of the death sentence in a particular case. In Texas, the class of death-eligible defendants is narrowed at the guilt stage because only five types of murder are classified as first-degree murder. See *id.*, at 270. At the sentencing stage, the jury is instructed that it must impose a sentence of death if it answers the following two questions affirmatively: "(1) whether the conduct of the defendant that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing criminal threat to society." *Id.*, at 269.[10] These questions require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability. The Texas statute directs the imposition of the death penalty only after the jury has decided that the defendant's actions were sufficiently egregious to warrant death.

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[9] Different Members of the Court have had different interpretations of *Jurek*. Compare *Penry* v. *Lynaugh*, 492 U. S., at 316, with *id.*, at 354–358 (SCALIA, J., joined by REHNQUIST, C. J., WHITE, and KENNEDY, JJ., concurring in part and dissenting in part); *Franklin* v. *Lynaugh*, 487 U. S. 164, 180, and n. 10 (1988) (plurality opinion). But until now I thought that all Members of the Court agreed that the holding of *Jurek* was contained in the joint opinion of Justices Stewart, Powell, and STEVENS, which concluded that the statute was constitutional because it adequately narrowed the class of murderers subject to the death penalty and because the questions presented to the jury would be interpreted broadly enough to allow the jury to consider any relevant mitigating circumstance. *Jurek*, 428 U. S., at 272–273 (joint opinion of Stewart, Powell, and STEVENS). Indeed, our holding last Term in *Penry* relied on this interpretation of *Jurek*. *Penry*, *supra*, at 316. It is curious, therefore, that the Court relies on JUSTICE WHITE's concurrence in *Jurek* to support its conclusion that the Pennsylvania statute is constitutional. JUSTICE WHITE, joined by Chief Justice Burger and JUSTICE REHNQUIST, concluded that the mandatory language in the Texas statute rendered the statute constitutional. *Jurek*, *supra*, at 278. Indeed, JUSTICE WHITE's concurrence in *Jurek* may have depended on the view that the Texas statute was constitutional precisely because it deprived the jury of *all* discretion in determining sentence. See *Roberts* v. *Louisiana*, 428 U. S. 325, 358 (1976) (WHITE, J., joined by Burger, C. J., and BLACKMUN and REHNQUIST, JJ., dissenting) ("[S]urely a State is not constitutionally forbidden to provide that the commission of certain crimes conclusively establishes that the criminal's character is such that he deserves death"); *Woodson*, 428 U. S., at 306 (WHITE, J., joined by Burger, C. J., and REHNQUIST, J., dissenting). But a majority of the Court has rejected that reasoning, see *Sumner* v. *Shuman*, 483 U. S. 66, 85 (1987), as well as that reading of the Texas statute. See *Penry*, *supra*, at 316.

The mandatory language in the Pennsylvania statute, however, does deprive the jury of any power to make such an independent judgment. The jury's determination that an aggravating circumstance exists ends the decisionmaking process. In addition, whether an aggravating circumstance exists is generally a question of fact relating to either the circumstances of the offense,[11] the status of the victim,[12] or the defendant's criminal record.[13] In many cases, the existence of the aggravating factor is not disputed. Finding an aggravating circumstance does not entail any moral judgment about the nature of the act or the actor, and therefore it does not give the jury an opportunity to decide whether it believes the defendant's particular offense warrants the death penalty.[14] Because the mandatory language in the Pennsylvania statute deprives a defendant of an individualized sentencing hearing in a way that the Texas statute does not, *Jurek* in no way supports the Court's conclusion that the Pennsylvania statute is constitutional.

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[10] A third question applies only if raised by the evidence: "'whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.'" *Jurek*, *supra*, at 269.

[11] See 42 Pa. Cons. Stat. §§ 9711(d)(2), (4), (6), (7), (8) (1988).

[12] See §§ 9711(d)(1), (3), (5).

[13] See §§ 9711(d)(9)–(12).

III

The Court's refusal to recognize that the "mandatory aspect" of the Pennsylvania statute deprives the defendant of an individualized sentencing hearing is contrary to reason. Rather than address the merits of petitioner's claim, the majority summarily concludes that the Eighth Amendment is "satisfied" because the jury may consider mitigating evidence.[15] Although our cases clearly hold that the ability to consider mitigating evidence is a constitutional requirement, it does not follow that this ability satisfies the constitutional demand for an individualized sentencing hearing. The "weight" of an aggravating circumstance is just as relevant to the propriety of the death penalty as the "weight" of any mitigating circumstances. The Court's unarticulated assumption that the legislature may define a group of crimes for which the death penalty is required in certain situations represents a marked departure from our previous cases. The Court's failure to provide any reasoning to reject a claim well grounded in our case law is always disturbing. An unexplained departure from fundamental principles in the death penalty context is inexcusable. I respectfully dissent.

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[14] The finding of three of the statutory aggravating circumstances requires more than the finding of facts. For example, the State may prove that the defendant created a grave risk of harm to others, that the killing was marked by torture, or that the defendant had a significant history of felony convictions involving the use of violence. §§ 9711(7), (8), (9). It is arguable that the jury's consideration of these aggravating circumstances allows the jury to conclude that the crime does not warrant the death penalty. However, unlike in Texas, the jury in every case is not required to consider these aggravating circumstances. Thus, at least in cases such as this one where these aggravating circumstances are not proffered, the jury has no ability to make any judgment about the seriousness of the crime.

[15] The Court's language is distressingly casual. We have long held that the ability of the sentencer to consider mitigating circumstances is a necessary—not just a sufficient—condition for the imposition of the death penalty. The defendant's right to have a jury consider mitigating circumstances is a fundamental part of the jury's role in a capital sentencing case which this Court has stringently protected. See *Penry* v. *Lynaugh*, *supra*, at 319; *Mills* v. *Maryland*, 486 U. S. 367, 377 (1988); *Hitchcock* v. *Dugger*, 481 U. S. 393, 399 (1987); *Skipper* v. *South Carolina*, 476 U. S. 1, 8 (1986); *Eddings* v. *Oklahoma*, 455 U. S. 104, 116 (1982); *Lockett* v. *Ohio*, 438 U. S., at 605.

IV

Even if I did not believe the Pennsylvania statute unconstitutionally deprives the jury of discretion to impose a life sentence, I would vacate petitioner's sentence. I adhere to my belief that the death penalty is in all circumstances cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U. S., at 227 (BRENNAN, J., dissenting).

MARYLAND *v.* BUIE

CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 88-1369. Argued December 4, 1989—Decided February 28, 1990

Following a Maryland armed robbery by two men, one of whom was wearing a red running suit, police obtained arrest warrants for respondent Buie and his suspected accomplice and executed the warrant for Buie at his house. After Buie was arrested upon emerging from the basement, one of the officers entered the basement "in case there was someone else" there and seized a red running suit lying in plain view. The trial court denied Buie's motion to suppress the running suit, the suit was introduced into evidence, and Buie was convicted of armed robbery and a weapons offense. The intermediate appellate court affirmed the denial of the suppression motion, but the State Court of Appeals reversed, ruling that the running suit was inadmissible because the officer who conducted the "protective sweep" of the basement did not have probable cause to believe that a serious and demonstrable potentiality for danger existed.

Held: The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. *Michigan* v. *Long*, 463 U. S. 1032, 1049–1050; *Terry* v. *Ohio*, 392 U. S. 1, 21. Pp. 330–337.

(a) In holding that, respectively, an on-the-street "frisk" and a roadside search of an automobile's passenger compartment were reasonable despite the absence of a warrant or probable cause, *Terry* and *Long* balanced the Fourth Amendment interests of the persons with whom they were dealing against the immediate interests of the police in protecting themselves from the danger posed by hidden weapons. Here, the police had an analogous interest in taking steps to assure themselves that Buie's house was not harboring other persons who were dangerous and who could unexpectedly launch an attack, and the fact that Buie had an expectation of privacy in rooms that were not examined by the police prior to the arrest does not mean that such rooms were immune from entry. No warrant was required, and as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be launched. Beyond that, however, just as in *Terry* and *Long*, there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger. Such a protective sweep is not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises. Pp. 331–336.

(b) *Chimel* v. *California*, 395 U. S. 752—which held that in the absence of a search warrant, the justifiable search incident to an in-home arrest could not extend beyond the arrestee's person and the area from within which he might have obtained a weapon—is distinguished. First, *Chimel* was concerned with a full-blown, top-to-bottom search of an entire house for evidence of the crime for which the arrest was made, not the more limited intrusion contemplated by a protective sweep. Second, the justification for the search incident to arrest in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house. P. 336.

(c) The Court of Appeals applied an unnecessarily strict Fourth Amendment standard in requiring a protective sweep to be justified by probable cause. The case is remanded for application of the proper standard. Pp. 336–337.

314 Md. 151, 550 A. 2d 79, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BLACKMUN, STEVENS, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., *post*, p. 337, and KENNEDY, J., *post*, p. 339, filed concurring opinions. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post*, p. 339.

Dennis M. Sweeney, Deputy Attorney General of Maryland, argued the cause for petitioner. With him on the briefs were *J. Joseph Curran, Jr.*, Attorney General, *Gary E. Bair*, *Mary Ellen Barbera*, and *Ann N. Bosse*, Assistant Attorneys General, and *Alexander Williams, Jr.*

Lawrence S. Robbins argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Starr*, *Assistant Attorney General Dennis*, *Deputy Solicitor General Bryson*, and *Kathleen A. Felton*.

John L. Kopolow argued the cause for respondent. With him on the brief were *Alan H. Murrell, Michael R. Braudes, Nancy S. Forster,* and *Gary S. Offutt.**

JUSTICE WHITE delivered the opinion of the Court.

A "protective sweep" is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding. In this case we must decide what level of justification is required by the Fourth and Fourteenth Amendments before police officers, while effecting the arrest of a suspect in his home pursuant to an arrest warrant, may conduct a warrantless protective sweep of all or part of the premises. The Court of Appeals of Maryland held that a running suit seized in plain view during such a protective sweep should have been suppressed at respondent's armed robbery trial because the officer who conducted the sweep did not have probable cause to believe that a serious and demonstrable potentiality for danger existed. 314 Md. 151, 166, 550 A. 2d 79, 86 (1988). We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer "possesse[d] a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]' the officer in believing," *Michigan* v. *Long*, 463 U. S. 1032, 1049–1050 (1983) (quoting *Terry* v. *Ohio*, 392 U. S. 1, 21 (1968)), that the area swept harbored an individual posing a danger to the officer or others. We accordingly vacate the judgment below and remand for application of this standard.

**Gregory U. Evans, Daniel B. Hales, Emory A. Plitt, Jr., Judith A. Ronzio, George D. Webster, Jack E. Yelverton, Fred E. Inbau, Wayne W. Schmidt,* and *James P. Manak* filed a brief for Americans for Effective Law Enforcement, Inc., et al. as *amici curiae* urging reversal.

Ira Reiner, Harry B. Sondheim, and *Eugene D. Tavris* filed a brief for the Appellate Committee of the California District Attorneys Association as *amicus curiae.*

I

On February 3, 1986, two men committed an armed robbery of a Godfather's Pizza restaurant in Prince George's County, Maryland. One of the robbers was wearing a red running suit. That same day, Prince George's County police obtained arrest warrants for respondent Jerome Edward Buie and his suspected accomplice in the robbery, Lloyd Allen. Buie's house was placed under police surveillance.

On February 5, the police executed the arrest warrant for Buie. They first had a police department secretary telephone Buie's house to verify that he was home. The secretary spoke to a female first, then to Buie himself. Six or seven officers proceeded to Buie's house. Once inside, the officers fanned out through the first and second floors. Corporal James Rozar announced that he would "freeze" the basement so that no one could come up and surprise the officers. With his service revolver drawn, Rozar twice shouted into the basement, ordering anyone down there to come out. When a voice asked who was calling, Rozar announced three times: "this is the police, show me your hands." App. 5. Eventually, a pair of hands appeared around the bottom of the stairwell and Buie emerged from the basement. He was arrested, searched, and handcuffed by Rozar. Thereafter, Detective Joseph Frolich entered the basement "in case there was someone else" down there. *Id.*, at 14. He noticed a red running suit lying in plain view on a stack of clothing and seized it.

The trial court denied Buie's motion to suppress the running suit, stating in part: "The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense." *Id.*, at 19. The State introduced the running suit into evidence at Buie's trial. A jury convicted Buie of robbery with a deadly weapon and using a handgun in the commission of a felony.

The Court of Special Appeals of Maryland affirmed the trial court's denial of the suppression motion. The court stated that Detective Frolich did not go into the basement to search for evidence, but to look for the suspected accomplice or anyone else who might pose a threat to the officers on the scene. 72 Md. App. 562, 571–572, 531 A. 2d 1290, 1295 (1987).

> "Traditionally, the sanctity of a person's home—his castle—requires that the police may not invade it without a warrant except under the most exigent of circumstances. But once the police are lawfully within the home, their conduct is measured by a standard of reasonableness . . . . [I]f there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause—reasonable suspicion—should be sufficient to justify a *limited additional intrusion* to investigate the *possibility* of their presence." *Id.*, at 575–576, 531 A. 2d, at 1297 (emphasis in original).

The Court of Appeals of Maryland reversed by a 4-to-3 vote. 314 Md. 151, 550 A. 2d 79 (1988). The court acknowledged that "when the intrusion is slight, as in the case of a brief stop and frisk on a public street, and the public interest in prevention of crime is substantial, reasonable articulable suspicion may be enough to pass constitutional muster," *id.*, at 159, 550 A. 2d, at 83. The court, however, stated that when the sanctity of the home is involved, the exceptions to the warrant requirement are few, and held: "[T]o justify a protective sweep of a home, the government must show that there is probable cause to believe that '"a serious and demonstrable potentiality for danger"' exists." *Id.*, at 159–160, 550 A. 2d, at 83 (citation omitted). The court went on to find that the State had not satisfied that probable-cause requirement. *Id.*, at 165–166, 550 A. 2d, at 86. We granted certiorari, 490 U. S. 1097 (1989).

II

It is not disputed that until the point of Buie's arrest the police had the right, based on the authority of the arrest warrant, to search anywhere in the house that Buie might have been found, including the basement. "If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Payton* v. *New York*, 445 U. S. 573, 602–603 (1980). There is also no dispute that if Detective Frolich's entry into the basement was lawful, the seizure of the red running suit, which was in plain view and which the officer had probable cause to believe was evidence of a crime, was also lawful under the Fourth Amendment. See *Arizona* v. *Hicks*, 480 U. S. 321, 326 (1987). The issue in this case is what level of justification the Fourth Amendment required before Detective Frolich could legally enter the basement to see if someone else was there.

Petitioner, the State of Maryland, argues that, under a general reasonableness balancing test, police should be permitted to conduct a protective sweep whenever they make an in-home arrest for a violent crime. As an alternative to this suggested bright-line rule, the State contends that protective sweeps fall within the ambit of the doctrine announced in *Terry* v. *Ohio*, 392 U. S. 1 (1968), and that such sweeps may be conducted in conjunction with a valid in-home arrest whenever the police reasonably suspect a risk of danger to the officers or others at the arrest scene. The United States, as *amicus curiae* supporting the State, also argues for a *Terry*-type standard of reasonable, articulable suspicion of risk to the officer, and contends that that standard is met here. Respondent argues that a protective sweep may not be undertaken without a warrant unless the exigencies of the situation render such warrantless search objectively reasonable. According to Buie, because the State has shown neither exigent circumstances to immediately enter Buie's house nor an unforeseen danger that arose once the officers were in the house, there is no excuse for the failure to obtain a search warrant to search for dangerous persons believed to be on the premises. Buie further contends that, even if the warrant requirement is inapplicable, there is no justification for relaxing the probable-cause standard. If something less than probable cause is sufficient, respondent argues that it is no less than individualized suspicion—specific, articulable facts supporting a reasonable belief that there are persons on the premises who are a threat to the officers. According to Buie, there were no such specific, articulable facts to justify the search of his basement.

III

It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures, *Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602 (1989). Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *United States* v. *Villamonte-Marquez*, 462 U. S. 579, 588 (1983); *Delaware* v. *Prouse*, 440 U. S. 648, 654 (1979). Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause. There are other contexts, however, where the public interest is such that neither a warrant nor probable cause is required. *Skinner*, *supra*, at 619–620; *Griffin* v. *Wisconsin*, 483 U. S. 868, 873 (1987); *New Jersey* v. *T. L. O.*, 469 U. S. 325, 340–341 (1985); *Terry* v. *Ohio*, 392 U. S., at 20.

The *Terry* case is most instructive for present purposes. There we held that an on-the-street "frisk" for weapons must be tested by the Fourth Amendment's general proscription against unreasonable searches because such a frisk involves "an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Ibid.* We stated that there is "'no ready test for determining reasonableness other than by balancing the need to search . . . against the invasion which the search . . . entails.'" *Id.*, at 21 (quoting *Camara* v. *Municipal Court of San Francisco*, 387 U. S. 523, 536–537 (1967)). Applying that balancing test, it was held that although a frisk for weapons "constitutes a severe, though brief, intrusion upon cherished personal security," 392 U. S., at 24–25, such a frisk is reasonable when weighed against the "need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Id.*, at 24. We therefore authorized a limited patdown for weapons where a reasonably prudent officer would be warranted in the belief, based on "specific and articulable facts," *id.*, at 21, and not on a mere "inchoate and unparticularized suspicion or 'hunch,'" *id.*, at 27, "that he is dealing with an armed and dangerous individual," *ibid.*

In *Michigan* v. *Long*, 463 U. S. 1032 (1983), the principles of *Terry* were applied in the context of a roadside encounter: "[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.*, at 1049–1050 (quoting *Terry*, *supra*, at 21). The *Long* Court expressly rejected the contention that *Terry* restricted preventative searches to the person of a detained suspect. 463 U. S., at 1047. In a sense, *Long* authorized a "frisk" of an automobile for weapons.

The ingredients to apply the balance struck in *Terry* and *Long* are present in this case. Possessing an arrest warrant and probable cause to believe Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found. Once he was found, however, the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.

That Buie had an expectation of privacy in those remaining areas of his house, however, does not mean such rooms were immune from entry. In *Terry* and *Long* we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them. In the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack. The risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter. A *Terry* or *Long* frisk occurs before a police-citizen confrontation has escalated to the point of arrest. A protective sweep, in contrast, occurs as an adjunct to the serious step of taking a person into custody for the purpose of prosecuting him for a crime. Moreover, unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary's "turf." An ambush in a confined setting of unknown configuration is more to be feared than it is in open, more familiar surroundings.

We recognized in *Terry* that "[e]ven a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Terry, supra,* at 24–25. But we permitted the intrusion, which was no more than necessary to protect the officer from harm. Nor do we here suggest, as the State does, that entering rooms not examined prior to the arrest is a *de minimis* intrusion that may be disregarded. We are quite sure, however, that the arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest. That interest is sufficient to outweigh the intrusion such procedures may entail.

We agree with the State, as did the court below, that a warrant was not required.[1] We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene. This is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one.[2]

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[1] Buie suggests that because the police could have sought a warrant to search for dangerous persons in the house, they were constitutionally required to do so. But the arrest warrant gave the police every right to enter the home to search for Buie. Once inside, the potential for danger justified a standard of less than probable cause for conducting a limited protective sweep.

[2] The State's argument that no level of objective justification should be required because of "the danger that inheres in the in-home arrest for a violent crime," Brief for Petitioner 23, is rebutted by *Terry* v. *Ohio*, 392 U. S. 1 (1968), itself. The State argues that "[o]fficers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis," Brief for Petitioner 23. But despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters. Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion

We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found.[3] The sweep lasts no longer

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before a frisk for weapons can be conducted. That approach is applied to the protective sweep of a house.

We reject the State's attempts to analogize this case to *Pennsylvania* v. *Mimms*, 434 U. S. 106 (1977) *(per curiam)*, and *Michigan* v. *Summers*, 452 U. S. 692 (1981). The intrusion in *Mimms*—requiring the driver of a lawfully stopped vehicle to exit the car—was *"de minimis,"* 434 U. S., at 111. *Summers* held that a search warrant for a house carries with it the authority to detain its occupants until the search is completed. The State contends that this case is the "mirror image" of *Summers* and that the arrest warrant carried with it the authority to search for persons who could interfere with the arrest. In that case, however, the search warrant implied a judicial determination that police had probable cause to believe that someone in the home was committing a crime. Here, the existence of the arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee's house. Moreover, the intrusion in *Summers* was less severe and much less susceptible to exploitation than a protective sweep. A more analogous case is *Ybarra* v. *Illinois*, 444 U. S. 85 (1979), in which we held that, although armed with a warrant to search a bar and bartender, the police could not frisk the bar's patrons absent individualized, reasonable suspicion that the person to be frisked was armed and presently dangerous. Here, too, the reasonable suspicion standard—"one of the relatively simple concepts embodied in the Fourth Amendment," *United States* v. *Sokolow*, 490 U. S. 1 (1989)—strikes the proper balance between officer safety and citizen privacy.

[3] Our reliance on the cursory nature of the search is not inconsistent with our statement in *Arizona* v. *Hicks*, 480 U. S. 321 (1987), that "[a] search is a search," *id.*, at 325, or with our refusal in *Hicks* to sanction a standard less than probable cause on the ground that the search of a stereo was a "cursory inspection," rather than a "full-blown search," *id.*, at 328. When the officer in *Hicks* moved the turntable to look at its serial number, he was searching for evidence plain and simple. There was no interest in officer safety or other exigency at work in that search. A protective sweep is without question a "search," as was the patdown in *Terry*, *supra*, at 16; they are permissible on less than probable cause only because they are limited to that which is necessary to protect the safety of officers and others.

than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.

IV

Affirmance is not required by *Chimel* v. *California*, 395 U. S. 752 (1969), where it was held that in the absence of a search warrant, the justifiable search incident to an in-home arrest could not extend beyond the arrestee's person and the area from within which the arrestee might have obtained a weapon. First, *Chimel* was concerned with a full-blown search of the entire house for evidence of the crime for which the arrest was made, see *id.*, at 754, 763, not the more limited intrusion contemplated by a protective sweep. Second, the justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house. To reach our conclusion today, therefore, we need not disagree with the Court's statement in *Chimel, id.*, at 766–767, n. 12, that "the invasion of privacy that results from a top-to-bottom search of a man's house [cannot be characterized] as 'minor,'" nor hold that "simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require," *ibid.* The type of search we authorize today is far removed from the "top-to-bottom" search involved in *Chimel;* moreover, it is decidedly not "automati[c]," but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.

V

We conclude that by requiring a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed, the Court of Appeals of Maryland applied an unnecessarily strict Fourth Amendment standard. The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene. We therefore vacate the judgment below and remand this case to the Court of Appeals of Maryland for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

Today the Court holds that reasonable suspicion, rather than probable cause, is necessary to support a protective sweep while an arrest is in progress. I agree with that holding and with the Court's opinion, but I believe it is important to emphasize that the standard applies only to *protective* sweeps. Officers conducting such a sweep must have a reasonable basis for believing that their search will reduce the danger of harm to themselves or of violent interference with their mission; in short, the search must be protective.

In this case, to justify Officer Frolich's entry into the basement, it is the State's burden to demonstrate that the officers had a reasonable basis for believing not only that someone in the basement might attack them or otherwise try to interfere with the arrest, but also that it would be safer to go down the stairs instead of simply guarding them from above until respondent had been removed from the house. The fact that respondent offered no resistance when he emerged from the basement is somewhat inconsistent with the hypothesis that the danger of an attack by a hidden confederate persisted after the arrest. Moreover, Officer Rozar testified that he was not worried about any possible danger when he arrested Buie. App. 9.[1] Officer Frolich, who conducted the search, supplied no explanation for why he might have thought another person was in the basement. He said only that he "had no idea who lived there." *Id.*, at 15. This admission is made telling by Officer Frolich's participation in the 3-day prearrest surveillance of Buie's home. *Id.*, at 4. The Maryland Court of Appeals was under the impression that the search took place after "Buie was safely outside the house, handcuffed and unarmed." 314 Md. 151, 166, 550 A. 2d 79, 86 (1988). All of this suggests that no reasonable suspicion of danger justified the entry into the basement.

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[1] Buie's attorney asked, "'You weren't worried about there being any danger or anything like that?'" Officer Rozar answered, "'No.'" App. 9.

Indeed, were the officers concerned about safety, one would expect them to do what Officer Rozar did before the arrest: guard the basement door to prevent surprise attacks. App. 5. As the Court indicates, Officer Frolich might, at the time of the arrest, reasonably have "look[ed] in" the already open basement door, *ante*, at 334, to ensure that no accomplice had followed Buie to the stairwell. But Officer Frolich did not merely "look in" the basement; he entered it.[2] That strategy is sensible if one wishes to search the basement. It is a surprising choice for an officer, worried about safety, who need not risk entering the stairwell at all.

The State may thus face a formidable task on remand. However, the Maryland courts are better equipped than are we to review the record. See, *e. g.*, 314 Md., at 155, n. 2, 550 A. 2d, at 81, n. 2 (discussing state-law rules restricting review of the record on appeal of suppression decisions); cf. *United States* v. *Hasting*, 461 U. S. 499, 516–518 (1983) (STEVENS, J., dissenting) (This Court should avoid undertaking record review functions that can "better be performed by other judges"). Moreover, the Maryland Court of Special

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[2] What more the officers might have done to protect themselves against threats from other places is obviously a question not presented on the facts of this case, and so is not one we can answer. Indeed, the peculiarity of Officer Frolich's search is that it appears to have concentrated upon the part of the house least likely to make the departing officers vulnerable to attack.

Appeals suggested that Officer Frolich's search could survive a "reasonable suspicion" test, 72 Md. App. 562, 576, 531 A. 2d 1290, 1297 (1987), and the Maryland Court of Appeals has not reviewed this conclusion. I therefore agree that a remand is appropriate.

JUSTICE KENNEDY, concurring.

The Court adopts the prudent course of explaining the general rule and permitting the state court to apply it in the first instance. The concurrence by JUSTICE STEVENS, however, makes the gratuitous observation that the State has a formidable task on remand. My view is quite to the contrary. Based on my present understanding of the record, I should think the officers' conduct here was in full accord with standard police safety procedure, and that the officers would have been remiss if they had not taken these precautions. This comment is necessary, lest by acquiescence the impression be left that JUSTICE STEVENS' views can be interpreted as authoritative guidance for application of our ruling to the facts of the case.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Today the Court for the first time extends *Terry* v. *Ohio*, 392 U. S. 1 (1968), into the home, dispensing with the Fourth Amendment's general requirements of a warrant and probable cause and carving a "reasonable suspicion" exception for protective sweeps in private dwellings. In *Terry, supra*, the Court held that a police officer may briefly detain a suspect based on a reasonable suspicion of criminal activity and may conduct a limited "frisk" of the suspect for concealed weapons in order to protect herself from personal danger. The Court deemed such a frisk "reasonable" under the Fourth Amendment in light of the special "need for law enforcement officers to protect themselves and other prospective victims of violence" during investigative detentions, *id.*, at 24, and the "brief, though far from inconsiderable, intrusion upon the sanctity of the person." *Id.*, at 26.

Terry and its early progeny "permit[ted] only brief investigative stops and extremely limited searches based on reasonable suspicion." *United State* v. *Place*, 462 U. S. 696, 714 (1983) (BRENNAN, J., concurring in result). But this Court more recently has applied the rationale underlying *Terry* to a wide variety of more intrusive searches and seizures,[1] prompting my continued criticism of the "'emerging tendency on the part of the Court to convert the *Terry* decision'" from a narrow exception into one that "'swallow[s] the general rule that [searches] are "reasonable" only if based on probable cause.'" *Place, supra*, at 719 (BRENNAN, J., concurring in result) (citations omitted).

The Court today holds that *Terry*'s "reasonable suspicion" standard "strikes the proper balance between officer safety and citizen privacy" for protective sweeps in private dwellings. *Ante*, at 335, n. 2. I agree with the majority that officers executing an arrest warrant within a private dwelling have an interest in protecting themselves against potential ambush by third parties, see *ante*, at 333, but the majority offers no support for its assumption that the danger of ambush during planned home arrests approaches the danger of unavoidable "on-the-beat" confrontations in "the myriad daily situations in which policemen and citizens confront each other on the street." *Terry, supra*, at 12.[2] In any event, the Court's implicit judgment that a protective sweep constitutes a "minimally intrusive" search akin to that involved in *Terry* markedly undervalues the nature and scope of the privacy interests involved.

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[1] The Court has recently relied on *Terry* to relax the warrant and probable-cause requirements for both searches of places, *e. g., New York* v. *Class*, 475 U. S. 106 (1986) (search of car interior); *Michigan* v. *Long*, 463 U. S. 1032 (1983) (same); and seizures of personal effects, *e. g., New Jersey* v. *T. L. O.*, 469 U. S. 325 (1985) (search of student's purse); *United States* v. *Place*, 462 U. S. 696 (1983) (seizure of luggage).

[2] Individual police officers necessarily initiate street encounters without advance planning "for a wide variety of purposes." *Terry* v. *Ohio*, 392 U. S., at 13. But officers choosing to execute an arrest warrant in the suspect's house may minimize any risk of ambush by, for example, a show

While the Fourth Amendment protects a person's privacy interests in a variety of settings, "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States District Court, Eastern District of Michigan*, 407 U. S. 297, 313 (1972).[3] The Court discounts the nature of the intrusion because it believes that the scope of the intrusion is limited. The Court explains that a protective sweep's scope is "narrowly confined to a cursory visual inspection of those places in which a person might be hiding," *ante*, at 327, and confined in duration to a period "no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises." *Ante*, at 335–336.[4] But these spatial and temporal

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of force; in this case, at least six armed officers secured the premises. And, of course, officers could select a safer venue for making their arrest.

[3] Here the officers' arrest warrant for Buie and their probable cause to believe he was present in the house authorized their initial entry. But, as the majority concedes, "[o]nce he was found . . . the search for him was over," and "Buie had an expectation of privacy in those remaining areas of his house." *Ante*, at 333. The fact that some areas were necessarily exposed to the police during Buie's arrest thus does not diminish his privacy interest in the remaining rooms. See *Chimel* v. *California*, 395 U. S. 752, 767, n. 12 (1969) ("[W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require").

[4] The protective sweep in this case may have exceeded the permissible temporal scope defined by the Court. The Court of Appeals of Maryland expressly noted that "at the time of the warrantless search, Buie was safely outside the house, handcuffed and unarmed." 314 Md. 151, 166, 550 A. 2d 79, 86 (1988). On remand, therefore, the state court need not decide whether the "reasonable suspicion" standard is satisfied in this case should it determine that the sweep of the basement took place after the police had

restrictions are not particularly limiting. A protective sweep would bring within police purview virtually all personal possessions within the house not hidden from view in a small enclosed space. Police officers searching for potential ambushers might enter every room including basements and attics; open up closets, lockers, chests, wardrobes, and cars; and peer under beds and behind furniture. The officers will view letters, documents, and personal effects that are on tables or desks or are visible inside open drawers; books, records, tapes, and pictures on shelves; and clothing, medicines, toiletries and other paraphernalia not carefully stored in dresser drawers or bathroom cupboards. While perhaps not a "full-blown" or "top-to-bottom" search, *ante*, at 336, a protective sweep is much closer to it than to a "limited patdown for weapons" or a "'frisk' of an automobile." *Ante*, at 332.[5] Because the nature and scope of the intrusion sanctioned here are far greater than those upheld in *Terry* and *Long*, the Court's conclusion that "[t]he ingredients to apply the balance struck in *Terry* and *Long* are present in this case," *ibid.*, is unwarranted. The "ingredient" of a minimally intrusive search is absent, and the Court's holding today therefore unpalatably deviates from *Terry* and its progeny.[6]

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sufficient time to "complete the arrest and depart the premises." *Ante*, at 336.

[5] Indeed, a protective sweep is sufficiently broad in scope that today's ruling might encourage police officers to execute arrest warrants in suspects' homes so as to take advantage of the opportunity to peruse the premises for incriminating evidence left in "plain view." This incentive runs directly counter to our central tenet that "in [no setting] is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home—a zone that finds its roots in clear and specific constitutional terms." *Payton* v. *New York*, 445 U. S. 573, 589 (1980).

[6] The Court's decision also to expand the "search incident to arrest" exception previously recognized in *Chimel* v. *California*, *supra*, allowing police officers without *any* requisite level of suspicion to look into "closets and other spaces immediately adjoining the place of arrest from which an at-

In light of the special sanctity of a private residence and the highly intrusive nature of a protective sweep, I firmly believe that police officers must have probable cause to fear that their personal safety is threatened by a hidden confederate of an arrestee before they may sweep through the entire home. Given the state-court determination that the officers searching Buie's home lacked probable cause to perceive such a danger and therefore were not lawfully present in the basement, I would affirm the state court's decision to suppress the incriminating evidence. I respectfully dissent.

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tack could be immediately launched," *ante*, at 334, is equally disquieting. *Chimel* established that police officers may presume as a matter of law, without need for factual support in a particular case, that arrestees might take advantage of weapons or destroy evidence in the area "within [their] immediate control"; therefore, a protective search of that area is *per se* reasonable under the Fourth Amendment. *Chimel, supra,* at 763. I find much less plausible the Court's implicit assumption today that arrestees are likely to sprinkle hidden allies throughout the rooms in which they might be arrested. Hence there is no comparable justification for permitting arresting officers to presume as a matter of law that they are threatened by ambush from "immediately adjoining" spaces.

MICHIGAN *v.* HARVEY

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

No. 88-512. Argued October 11, 1989—Decided March 5, 1990

Following respondent Harvey's arraignment on rape charges and the appointment of counsel for him, he told a police officer that he wanted to make a statement, but did not know whether he should talk to his lawyer. Although the record is unclear as to the entire context of the discussion, the officer told Harvey that he did not need to speak with his attorney, because "his lawyer was going to get a copy of the statement anyway." Harvey then signed a constitutional rights waiver form and made a statement detailing his version of the events on the night in question. When his testimony at his state-court bench trial conflicted with his statement to the police, the court allowed the State to use the statement to impeach his testimony. He was convicted of first-degree criminal sexual conduct, but the Michigan Court of Appeals reversed. That court ruled that the statement was inadmissible even for impeachment purposes, because it was taken in violation of Harvey's Sixth Amendment right to counsel, citing *Michigan* v. *Jackson*, 475 U. S. 625. The State concedes that the police transgressed the rule of *Jackson*, which held that once a defendant invokes his Sixth Amendment right to counsel, any waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if given in a police-initiated discussion, and that evidence obtained pursuant to that waiver is inadmissible in the prosecution's case in chief.

Held: A statement to police taken in violation of *Jackson* may be used to impeach a defendant's testimony. The *Jackson* rule is based on the identical "prophylactic rule" announced in *Edwards* v. *Arizona*, 451 U. S. 477, in the context of the Fifth Amendment privilege against self-incrimination during custodial interrogation. Moreover, *Harris* v. *New York*, 401 U. S. 222, and subsequent cases have held that voluntary statements taken in violation of Fifth Amendment prophylactic rules, while inadmissible in the prosecution's case in chief, may nevertheless be used to impeach the defendant's conflicting testimony. There is no reason for a different result in a *Jackson* case. Harvey's argument for distinguishing such cases from Fifth Amendment cases—that, because the adversarial process is commenced at the time of a *Jackson* violation, postarraignment interrogations implicate the constitutional guarantee of the Sixth Amendment itself, whereas prearraignment Fifth Amendment violations relate only to procedural safeguards that are not themselves constitutionally protected rights—is without merit. Nothing in the

Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney. Cf. *Patterson* v. *Illinois*, 487 U. S. 285. Moreover, Harvey's view would render the *Jackson* rule wholly unnecessary, because even waivers given during *defendant-initiated* conversations would be *per se* involuntary or otherwise invalid, unless counsel were first notified. Harvey's alternative assertion—that the police officer who took his statement affirmatively misled him as to his need for counsel and therefore violated the "core value" of the Sixth Amendment's constitutional guarantee, such that his purported waiver is invalid and the statement may not be used even for impeachment purposes—is also unavailing, since the present record is insufficient to determine whether there was a knowing and voluntary waiver of Sixth Amendment rights. Pp. 348–354.

Reversed and remanded.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 355.

Timothy A. Baughman argued the cause and filed a brief for petitioner.

Robert M. Morgan argued the cause and filed a brief for respondent.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

In *Michigan* v. *Jackson*, 475 U. S. 625 (1986), the Court established a prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right—even if voluntary, knowing, and intelligent under traditional standards—is presumed invalid if secured pursuant to police-initiated conversation. We held that statements obtained in violation of that rule may not be admitted as substantive evidence in the prosecution's case in chief. The question presented in this case is whether the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony. We hold that it may do so.

**Acting Solicitor General Bryson* and *Assistant Attorney General Dennis* filed a brief for the United States as *amicus curiae* urging reversal.

Steven R. Shapiro filed a brief for the American Civil Liberties Union et al. as *amici curiae* urging affirmance.

Respondent Tyris Lemont Harvey was convicted of two counts of first-degree criminal sexual conduct in connection with the rape of Audrey Sharp on June 11, 1986. Harvey was taken into custody on July 2, 1986, and on that date, he made a statement to an investigating officer. He was arraigned later on July 2, and counsel was appointed for him. More than two months later, Harvey told another police officer that he wanted to make a second statement, but did not know whether he should talk to his lawyer. Although the entire context of the discussion is not clear from the record, the officer told respondent that he did not need to speak with his attorney, because "his lawyer was going to get a copy of the statement anyway." App. 32–33 (stipulation of prosecution). Respondent then signed a constitutional rights waiver form, on which he initialed the portions advising him of his right to remain silent, his right to have a lawyer present before and during questioning, and his right to have a lawyer appointed for him prior to any questioning. App. to Pet. for Cert. 3a–4a.[1] Asked whether he understood his constitutional rights, respondent answered affirmatively. He then gave a statement detailing his version of the events of June 11.

At a bench trial, Sharp testified that Harvey visited her home at 2:30 a.m. on the date in question and asked to use the telephone. After placing a call, Harvey confronted Sharp with a barbecue fork, and a struggle ensued. According to Sharp, respondent struck her in the face, threatened her with the fork and a pair of garden shears, and eventually threw her to the floor of her kitchen. When she ran to the living room to escape, Harvey pursued her with the weapons, demanded that she take off her clothes, and forced her to engage in sexual acts.

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[1] Harvey declined to initial portions of the waiver form explaining that anything he said could be used against him in court, and that he could decide at any time to exercise his rights and not answer any questions or make any statement. App. to Pet. for Cert. 4a.

Harvey testified in his own defense and presented a conflicting account of the night's events. He claimed that he had gone to Sharp's home at 9 p.m. and invited her to smoke some crack cocaine, which he offered to supply in return for sexual favors. She agreed, but after smoking the cocaine, she refused to perform the favors. When respondent would not leave her house, Sharp allegedly grabbed the barbecue fork and threatened him, triggering a brief fight during which he grabbed the fork and threw it to the floor. The two then moved to the living room, where, according to Harvey, Sharp voluntarily removed her clothes. He testified, however, that the two never engaged in sexual intercourse and that he left shortly thereafter.

On cross-examination, the prosecutor used Harvey's second statement to the police to impeach his testimony. Before doing so, the prosecutor stipulated that the statement "was not subject to proper Miranda," App. 32, and therefore could not have been used in the case in chief. But because the statement was voluntary, the prosecutor argued that it could be used for impeachment under our decision in *Harris* v. *New York*, 401 U. S. 222 (1971). Defense counsel did not object, App. 34; App. to Pet. for Cert. 5a, and the trial court permitted the questioning. The prosecutor then impeached certain of Harvey's statements, including his claim that he had thrown the barbecue fork to the floor, by showing that he had omitted that information from his statement to the police. App. 36–45.[2] The trial judge believed the victim's testimony and found respondent guilty as charged.

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[2] Respondent also told police that another man and woman had been present in Sharp's house on the night of the incident and that he thought the man's name was "Michael." At trial, however, respondent said that he did not know the man's name. App. 36–37. Respondent further testified that "Michael" had brought some cocaine to Sharp's home, but his statement to police only mentioned cocaine that respondent had provided. *Id.*, at 39.

The Michigan Court of Appeals reversed the conviction. The court noted that if the second statement had been taken only in violation of the rules announced in *Miranda* v. *Arizona*, 384 U. S. 436 (1966), it could have been used to impeach Harvey's testimony. It held, however, that the statement was inadmissible even for impeachment purposes, because it was taken "in violation of defendant's Sixth Amendment right to counsel. See *e. g.*, *Michigan v. Jackson*, 475 US 625." App. to Pet. for Cert. 6a–7a. Because the trial "involved a credibility contest between defendant and the victim," the court concluded that the impeachment was not harmless beyond a reasonable doubt. *Id.*, at 7a. The Michigan Supreme Court denied leave to appeal, three justices dissenting, and we granted certiorari. 489 U. S. 1010 (1989). We now reverse.

To understand this case, it is necessary first to review briefly the Court's jurisprudence surrounding the Sixth Amendment. The text of the Amendment provides in pertinent part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." The essence of this right, we recognized in *Powell* v. *Alabama*, 287 U. S. 45 (1932), is the opportunity for a defendant to consult with an attorney and to have him investigate the case and prepare a defense for trial. *Id.*, at 58, 71. More recently, in a line of cases beginning with *Massiah* v. *United States*, 377 U. S. 201 (1964), and extending through *Maine* v. *Moulton*, 474 U. S. 159 (1985), the Court has held that once formal criminal proceedings begin, the Sixth Amendment renders inadmissible in the prosecution's case in chief statements "deliberately elicited" from a defendant without an express waiver of the right to counsel. See also *United States* v. *Henry*, 447 U. S. 264 (1980); *Brewer* v. *Williams*, 430 U. S. 387 (1977). For the fruits of postindictment interrogations to be admissible in a prosecution's case in chief, the State must prove a voluntary, knowing, and intelligent relinquishment of the Sixth Amendment right to counsel. *Patterson* v. *Illinois*, 487 U. S. 285, 292, and n. 4 (1988); *Brewer, supra,* at 404. We have recently held that when a suspect waives his right to counsel after receiving warnings equivalent to those prescribed by *Miranda* v. *Arizona, supra,* that will generally suffice to establish a knowing and intelligent waiver of the Sixth Amendment right to counsel for purposes of postindictment questioning. *Patterson* v. *Illinois, supra.*

In *Michigan* v. *Jackson,* 475 U. S. 625 (1986), the Court created a bright-line rule for deciding whether an accused who has "asserted" his Sixth Amendment right to counsel has subsequently waived that right. Transposing the reasoning of *Edwards* v. *Arizona,* 451 U. S. 477 (1981), which had announced an identical "prophylactic rule" in the Fifth Amendment context, see *Solem* v. *Stumes,* 465 U. S. 638, 644 (1984), we decided that after a defendant requests assistance of counsel, any waiver of Sixth Amendment rights given in a discussion initiated by police is presumed invalid, and evidence obtained pursuant to such a waiver is inadmissible in the prosecution's case in chief. *Jackson, supra,* at 636. Thus, to help guarantee that waivers are truly voluntary, *Jackson* established a presumption which renders invalid some waivers that would be considered voluntary, knowing, and intelligent under the traditional case-by-case inquiry called for by *Brewer* v. *Williams.*

There is no dispute in this case that respondent had a Sixth Amendment right to counsel at the time he gave the statement at issue. The State further concedes that the police transgressed the *Jackson* rule, because the colloquy between respondent and the investigating officer "cannot be viewed as defendant-initiated interrogation." Tr. of Oral Arg. 52. The question, then, is whether a statement to police taken in violation of *Jackson* can be admitted to impeach a defendant's inconsistent trial testimony.

Michigan v. *Jackson* is based on the Sixth Amendment, but its roots lie in this Court's decisions in *Miranda* v. *Ari-*

zona, *supra*, and succeeding cases. *Miranda*, of course, required police interrogators to advise criminal suspects of their rights under the Fifth and Fourteenth Amendments and set forth a now-familiar set of suggested instructions for that purpose. Although recognizing that the *Miranda* rules would result in the exclusion of some voluntary and reliable statements, the Court imposed these "prophylactic standards" on the States, see *Michigan* v. *Tucker*, 417 U. S. 433, 446 (1974), to safeguard the Fifth Amendment privilege against self-incrimination. *Edwards* v. *Arizona* added a second layer of protection to the *Miranda* rules, holding that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." 451 U. S., at 484. *Edwards* thus established another prophylactic rule designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights. See *Oregon* v. *Bradshaw*, 462 U. S. 1039, 1044 (1983) (plurality opinion).

Jackson simply superimposed the Fifth Amendment analysis of *Edwards* onto the Sixth Amendment. Reasoning that "the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation," *Jackson*, *supra*, at 632, the Court in *Jackson* concluded that the *Edwards* protections should apply when a suspect charged with a crime requests counsel outside the context of interrogation. This rule, like *Edwards*, is based on the supposition that suspects who assert their right to counsel are unlikely to waive that right voluntarily in subsequent interrogations.

We have already decided that although statements taken in violation of only the prophylactic *Miranda* rules may not be used in the prosecution's case in chief, they are admissible to impeach conflicting testimony by the defendant. *Harris* v.

New York, 401 U. S. 222 (1971); *Oregon* v. *Hass*, 420 U. S. 714 (1975). The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal "obligation to speak truthfully and accurately," *Harris*, 401 U. S., at 225, and we have consistently rejected arguments that would allow a defendant to "'turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths.'" *Id.*, at 224 (quoting *Walder* v. *United States*, 347 U. S. 62, 65 (1954)). See also *Hass*, *supra*, at 722; *United States* v. *Havens*, 446 U. S. 620, 626 (1980).

There is no reason for a different result in a *Jackson* case, where the prophylactic rule is designed to ensure voluntary, knowing, and intelligent waivers of the Sixth Amendment right to counsel rather than the Fifth Amendment privilege against self-incrimination or "right to counsel." We have mandated the exclusion of reliable and probative evidence for *all* purposes only when it is derived from involuntary statements. *New Jersey* v. *Portash*, 440 U. S. 450, 459 (1979) (compelled incriminating statements inadmissible for impeachment purposes); *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978) (same). We have never prevented use by the prosecution of relevant voluntary statements by a defendant, particularly when the violations alleged by a defendant relate only to procedural safeguards that are "not themselves rights protected by the Constitution," *Tucker*, *supra*, at 444 (*Miranda* rules), but are instead measures designed to ensure that constitutional rights are protected. In such cases, we have decided that the "search for truth in a criminal case" outweighs the "speculative possibility" that exclusion of evidence might deter future violations of rules not compelled directly by the Constitution in the first place. *Hass, supra,* at 722–723; *Havens, supra,* at 627 (reaffirming *Hass*). *Hass* was decided 15 years ago, and no new information has come to our attention which should lead us to think otherwise now.

Respondent argues that there should be a different exclusionary rule for *Jackson* violations than for transgressions of *Edwards* and *Miranda.* The distinction, he suggests, is that the adversarial process has commenced at the time of a *Jackson* violation, and the postarraignment interrogations thus implicate the constitutional guarantee of the Sixth Amendment itself. But nothing in the Sixth Amendment prevents a suspect charged with a crime and represented by counsel from voluntarily choosing, on his own, to speak with police in the absence of an attorney. We have already held that a defendant whose Sixth Amendment right to counsel has attached by virtue of an indictment may execute a knowing and intelligent waiver of that right in the course of a police-initiated interrogation. *Patterson* v. *Illinois,* 487 U. S. 285 (1988). To be sure, once a defendant obtains or even requests counsel as respondent had here, analysis of the waiver issue changes. But that change is due to the protective rule we created in *Jackson* based on the apparent inconsistency between a request for counsel and a later voluntary decision to proceed without assistance. See 487 U. S., at 290, n. 3.; cf. *Michigan* v. *Mosley,* 423 U. S. 96, 110, n. 2 (1975) (WHITE, J., concurring in result).

In other cases, we have explicitly declined to hold that a defendant who has obtained counsel cannot himself waive his right to counsel. See *Brewer,* 430 U. S., at 405–406 ("The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not") (emphasis in original); *Estelle* v. *Smith,* 451 U. S. 454, 471–472, n. 16 (1981) ("We do not hold that respondent was precluded from waiving this constitutional right [to counsel]. . . . No such waiver has been shown, or even alleged, here"). A defendant's right to rely on counsel as a "medium" between the defendant and the State attaches upon the initiation of formal charges, *Moulton*, 474 U. S., at 176, and respondent's contention that a defendant cannot execute a valid waiver of the right to counsel without first speaking to an attorney is foreclosed by our decision in *Patterson*. Moreover, respondent's view would render the prophylactic rule adopted in *Jackson* wholly unnecessary, because even waivers given during *defendant-initiated* conversations would be *per se* involuntary or otherwise invalid, unless counsel were first notified.

Although a defendant may sometimes later regret his decision to speak with police, the Sixth Amendment does not disable a criminal defendant from exercising his free will. To hold that a defendant is inherently incapable of relinquishing his right to counsel once it is invoked would be "to imprison a man in his privileges and call it the Constitution." *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942). This we decline to do. Both *Jackson* and *Edwards* establish prophylactic rules that render some otherwise valid waivers of constitutional rights invalid when they result from police-initiated interrogation, and in neither case should "the shield provided by [the prophylactic rule] be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Harris*, 401 U. S., at 226.

Respondent and *amici* assert, alternatively, that the conduct of the police officer who took Harvey's second statement violated the "core value" of the Sixth Amendment's constitutional guarantee, and under those circumstances, the second statement may not be used even for impeachment purposes. They contend that respondent was affirmatively misled as to his need for counsel, and his purported waiver is therefore invalid. But on the record before us, it is not possible to determine whether Harvey's waiver was knowing and voluntary. The state courts developed no record on that issue, and the Michigan Court of Appeals did not rest its holding on any such determination. There was no testimony on this point before the trial court. The only statement in the trial record concerning the issue of waiver is the prosecutor's concession that the second statement was taken in violation of respondent's *Miranda* rights. But that concession is consistent with the Michigan Court of Appeals' finding that the police violated *Jackson*, which is, after all, only a Sixth Amendment analogue to the *Miranda* and *Edwards* decisions. The Michigan court made no independent inquiry into whether there had been an otherwise valid waiver of the right to counsel, and respondent's counsel himself conceded that, putting aside the prosecutor's concession, the record is insufficient to determine whether there was a voluntary waiver of Sixth Amendment rights. Tr. of Oral Arg. 31–32. In short, the issue was never litigated in this case.

Because respondent's counsel did not object at trial to the use of his second statement for impeachment purposes, the State had no occasion to offer evidence to establish that Harvey gave a knowing and voluntary waiver of his right to counsel under traditional standards. On remand, the Michigan courts are free to conduct a hearing on that question. It is the State's burden to show that a waiver is knowing and voluntary, *Brewer* v. *Williams*, *supra*, at 404, and if all the circumstances in a particular case show that the police have engaged in a course of conduct which would render the waiver involuntary, the burden will not be satisfied. Those facts are not before us, however, and we need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel.

The judgment of the Michigan Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The question presented by this case, as I understand it, is whether the State may initiate a private interview with an indicted and represented defendant to obtain impeachment evidence for use at trial. The answer to that question should be plain: "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." *Maine* v. *Moulton*, 474 U. S. 159, 176 (1985). This right to rely on counsel applies whether the State is seeking evidence for use in its case in chief, rebuttal evidence, information about trial strategy, or material for use as impeachment.

The Court, couching its conclusion in the language of "prophylactic rules," seemingly answers this question in the affirmative. It reasons as follows: Although *Michigan* v. *Jackson*, 475 U. S. 625 (1986), is based on the Sixth Amendment, it protects only Fifth Amendment values; the Fifth Amendment does not prohibit the introduction of statements taken after the accused has invoked his right to counsel for use as impeachment; therefore, the Sixth Amendment, as interpreted in *Jackson*, does not prohibit the use of evidence taken in violation of its strictures for impeachment at trial. The Court's syllogism is flawed from the beginning. Only two Terms ago, we made clear that the constitutional rule recognized in *Jackson* is based on the Sixth Amendment interest in preserving "the integrity of an accused's choice to communicate with police only through counsel." *Patterson* v. *Illinois*, 487 U. S. 285, 291 (1988). The Court should acknowledge as much and hold that the Sixth Amendment is violated when the fruits of the State's impermissible encounter with the represented defendant are used for impeachment just as it is when the fruits are used in the prosecutor's case in chief.

I

To explain the error of the Court's analysis, it is appropriate to start where the Court does with the difference between the Fifth and Sixth Amendments and the values each serves. The Fifth Amendment protects against compelled self-incrimination.[1] It prevents a criminal defendant from being made "'the deluded instrument of his own conviction.'" *Culombe* v. *Connecticut*, 367 U. S. 568, 581 (1961) (opinion of Frankfurter, J.) (quoting 2 W. Hawkins, Pleas of the Crown 595 (8th ed. 1824)). Our decisions in *Miranda* and its progeny primarily safeguard that right against "the compulsion inherent in custodial surroundings." *Miranda* v. *Arizona*, 384 U. S. 436, 458 (1966). The initiation by the police of contact with an unrepresented defendant, after the invocation of the right to counsel during interrogation or at arraignment, creates an irrebuttable presumption that a defendant's waiver of his privilege against compelled self-incrimination is not voluntary. See *Edwards* v. *Arizona*, 451 U. S. 477 (1981); *Michigan* v. *Mosley*, 423 U. S. 96, 110, n. 2 (1975) (WHITE, J., concurring in result); see also *ante*, at 350. But when that compulsion has been dispelled by the suspect's initiation of interrogation and voluntary waiver of his rights, there is no remaining Fifth Amendment objection to introduction at trial of a statement made outside the presence of counsel. See, *e. g.*, *Oregon* v. *Bradshaw*, 462 U. S. 1039 (1983).

The Sixth Amendment right to counsel[2] is much more pervasive because it affects the ability of the accused to assert any other rights he might have.[3] It is indisputable that the

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[1] "No person shall be . . . compelled in any criminal case to be a witness against himself . . . ." U. S. Const., Amdt. 5.

[2] "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U. S. Const., Amdt. 6.

[3] "An accused's right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases 'are necessities, not luxuries.' Their presence is essential because they are the

Amendment assures "'Assistance' at trial, when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash,* 413 U. S. 300, 309 (1973); see also *Perry* v. *Leeke,* 488 U. S. 272, 279 (1989); *United States* v. *Cronic,* 466 U. S. 648, 659, n. 25 (1984). That guarantee applies equally whether the defendant is presenting his case or the State is rebutting or impeaching the defendant's evidence. The State's interest in truthseeking is congruent with the defendant's interest in representation by counsel, for it is an elementary premise of our system of criminal justice "'that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free.'" *Cronic,* 466 U. S., at 655 (quoting *Herring* v. *New York,* 422 U. S. 853, 862 (1975)); see also *Penson* v. *Ohio,* 488 U. S. 75, 84 (1988).

The accused's right to the assistance of counsel is not limited to participation in the trial itself. A defendant is entitled to the aid of his lawyer from the time of arraignment "when consultation, thoroughgoing investigation and preparation [are] vitally important," *Powell* v. *Alabama,* 287 U. S. 45, 57 (1932), through the time of first appeal. See *Penson,* 488 U. S., at 85; *Anders* v. *California,* 386 U. S. 738 (1967); *Douglas* v. *California,* 372 U. S. 353 (1963). Just as the Sixth Amendment's right to "the Assistance" of counsel necessarily encompasses a right to the effective assistance of counsel, see *Cronic,* 466 U. S., at 654–655; *Avery* v. *Alabama,* 308 U. S. 444, 446 (1940), so too the accused's right to have counsel "for his defence" in a "criminal prosecutio[n]" in-

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means through which the other rights of the person on trial are secured. Without counsel, the right to a trial itself would be 'of little avail,' as this Court has recognized repeatedly. 'Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.'" *United States* v. *Cronic,* 466 U. S. 648, 653–654 (1984) (footnotes omitted).

See also *Penson* v. *Ohio,* 488 U. S. 75, 84 (1988).

cludes the right to rely on counsel after the government's role has shifted from investigation to accusation and the "defendant finds himself faced with the prosecutorial forces of organized society." *Kirby* v. *Illinois*, 406 U. S. 682, 689 (1972) (opinion of Stewart, J.); see also *Moran* v. *Burbine*, 475 U. S. 412, 430 (1986).[4] Any lesser guarantee would provide insufficient protection against any attempt by the State to supplant "the public trial guaranteed by the Bill of Rights" with a "secret trial in the police precincts." *Spano* v. *New York*, 360 U. S. 315, 326 (1959) (Douglas, J., concurring).[5]

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[4] The Court has recognized that the defendant has a right to counsel at a preliminary hearing where a plea is entered that may subsequently be introduced as evidence at trial, *White* v. *Maryland*, 373 U. S. 59 (1963), at a pretrial lineup, where counsel is necessary to "assure a meaningful confrontation at trial," *United States* v. *Wade*, 388 U. S. 218, 236 (1967), and during a pretrial interrogation when the State attempts to elicit information directly from the accused. *Brewer* v. *Williams*, 430 U. S. 387, 401 (1977); *id.*, at 415 (STEVENS, J., concurring). See also *Coleman* v. *Alabama*, 399 U. S. 1, 9 (1970); *Hamilton* v. *Alabama*, 368 U. S. 52 (1961). The Court has also applied the Sixth Amendment's protection to surreptitious government attempts to deliberately elicit information from the indicted defendant. See *Maine* v. *Moulton*, 474 U. S. 159 (1985); *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964).

[5] The application of the Sixth Amendment guarantee to these pretrial events constitutes simple recognition that under the modern system of law enforcement and public prosecution, the "criminal prosecution" to which the Sixth Amendment refers begins when formal charges are filed. As we explained in *United States* v. *Wade*, 388 U. S., at 224:

"When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshalled, largely at the trial itself. In contrast, today's law enforcement machinery involves critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to 'critical' stages of the proceedings." (Footnote omitted.)

See also *United States* v. *Ash*, 413 U. S. 300, 310–311 (1973).

The Court correctly explains that *Jackson* was based in part on Fifth Amendment concerns extending "the *Edwards* protections" to the situation "when a suspect charged with a crime requests counsel outside the context of interrogation." *Ante*, at 350. However, that was not the whole of our opinion. *Jackson* is also firmly and explicitly rooted in our Sixth Amendment decisions holding that an indicted defendant has the "right to rely on counsel as a 'medium' between him and the State" whenever the State attempts to deliberately elicit information from him. See *Maine* v. *Moulton*, 474 U. S., at 176; *Brewer* v. *Williams*, 430 U. S. 387 (1977); *United States* v. *Henry*, 447 U. S. 264 (1980); *Massiah* v. *United States*, 377 U. S. 201 (1964). *Jackson* made clear that that right applied to the State's initial question whether the defendant would like to waive his constitutional rights as well as to any subsequent questions asking for particular incriminating information. 475 U. S., at 632.[6] The defendant may waive the right to be free from direct state communication by initiating contact with the State. But if the State initiates communication with a represented defendant outside the presence of counsel any subsequent waiver of the right to rely on counsel is not just "presumed invalid," *ante*, at 349; it "*is* invalid." *Jackson*, 475 U. S., at 636 (emphasis added). Preventing the State from directly contacting a represented defendant thus does not, as the Court states, "'imprison a man in his privileges,'" *ante*, at 353 (quoting *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 280 (1942)); it simply recognizes and gives respect to the defendant's previously invoked choice to communicate with the State only through counsel. As JUSTICE WHITE explained for the

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[6] Indeed, we expressly foreshadowed the result in *Jackson*, and its grounding on the Sixth Amendment protection of the attorney-client relationship when we stated in *Maine* v. *Moulton*, 474 U. S., at 178, n. 14, that the defendant's right to counsel "was violated as soon as the State's agent engaged Moulton in conversation about the charges pending against him" without counsel being present.

Court in *Patterson* v. *Illinois,* while "an accused [can make] an *initial* election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone," "the essence" of *Jackson* and our earlier decision in *Edwards* v. *Arizona,* 451 U. S. 477 (1981), is "[p]reserving the integrity of an accused's choice to communicate with the police only through counsel." 487 U. S., at 291. Indeed, we expressly noted, in explaining why an unrepresented defendant could waive his Sixth Amendment rights without counsel being present, that "[o]nce an accused has a lawyer, a distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship takes effect." *Id.*, at 290, n. 3.

The right to consult with counsel prior to the commencement of an interrogation, moreover, cannot be limited to those interrogations that produce evidence for use in the State's case in chief. The interests of the defendant in the assistance of counsel in his confrontation with the prosecutorial forces of organized society extend to all efforts to elicit information from the defendant whether for use as impeachment or rebuttal at trial or simply to formulate trial strategy. Cf. *Weatherford* v. *Bursey,* 429 U. S. 545, 552, 554 (1977); *Wyrick* v. *Fields,* 459 U. S. 42, 54 (1982) (MARSHALL, J., dissenting). Under *Estelle* v. *Smith,* 451 U. S. 454, 469–471 (1981), for example, psychiatric evidence taken from a represented defendant without notice to counsel may not be introduced at the sentencing phase of a capital trial even when, under Fifth Amendment standards, the evidence is otherwise admissible. See *Powell* v. *Texas,* 492 U. S. 680, 681 (1989). Whether or not the accused has a right to have counsel present during a psychiatric examination, it is clear that there is a Sixth Amendment right to consult with counsel prior to submitting to the examination. 451 U. S., at 471; see also *Satterwhite* v. *Texas,* 486 U. S. 249, 254 (1988). Those concerns are not limited to the capital sentencing context. In *Buchanan* v. *Kentucky,* 483 U. S. 402 (1987), the Court unanimously agreed that *Estelle* was applicable to the use of psychiatric evidence as rebuttal during the guilt stage of a noncapital trial, holding that before the State initiates a psychiatric examination of a defendant, defense counsel must be informed "about the scope and nature of the proceeding." 483 U. S., at 424; see also *id.*, at 425, n. 21; *id.*, at 433–434 (MARSHALL, J., dissenting). After the right to counsel has been implemented, the State may not short-circuit the adversarial system by confronting the defendant behind counsel's back. In this case, there should be no equivocation about the conclusion that the State violated the Sixth Amendment when it initiated a private interview with respondent outside the presence of counsel and used the products of the interview as impeachment at trial.

II

Instead of acknowledging that the facts describe a plain violation of respondent's Sixth Amendment right, the Court elides the issue by recharacterizing it as involving nothing more than the violation of a "prophylactic" rule. The purpose of this recharacterization is to enable the Court to draw an analogy to cases like *Walder* v. *United States*, 347 U. S. 62, 65 (1954), *Harris* v. *New York*, 401 U. S. 222 (1971), *Oregon* v. *Hass*, 420 U. S. 714 (1975), and *United States* v. *Havens*, 446 U. S. 620, 626 (1980), in which the Court held that the interests in deterring violations of *Miranda* and the Fourth Amendment were adequately served by excluding the illegally obtained evidence from the prosecutor's case in chief. The Court's analysis, however, simply ignores the reasons why evidence that is taken from an indicted defendant outside the presence of counsel is excluded from trial.

The Court has held that evidence seized in violation of the Fourth Amendment is excluded from a criminal trial not as a personal right of the criminal defendant but rather as a remedy for a wrong that is fully accomplished at the time the evidence is obtained. See, *e. g.*, *Stone* v. *Powell*, 428 U. S. 465, 486 (1976); *United States* v. *Calandra*, 414 U. S. 338, 348 (1974). Thus it is that evidence that is the product of an unreasonable search or seizure may nonetheless be introduced for impeachment purposes. Since its introduction causes no independent constitutional harm, the Court has reasoned that use of illegally obtained evidence for impeachment is not objectionable as long as the general efficacy of the exclusionary rule in deterring future violations of the Fourth Amendment is not thereby impaired. See *Havens*, 446 U. S., at 627–628.

A similar approach has characterized the Court's analysis of introduction of statements taken in violation of a defendant's rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The Court has held that *Miranda* establishes a prophylactic rule that "sweeps more broadly than the Fifth Amendment itself." *Oregon* v. *Elstad*, 470 U. S. 298, 306 (1985); see *New York* v. *Quarles*, 467 U. S. 649, 654 (1984); *Michigan* v. *Tucker*, 417 U. S. 433, 444 (1974). Unwarned statements or statements improperly taken after the invocation of the right to counsel or the right to remain silent, such as respondent's statement here, must be excluded from the State's case in chief to ensure compliance with *Miranda*'s dictates. But as long as the statement is not unconstitutionally coerced or involuntary, see *New Jersey* v. *Portash*, 440 U. S. 450 (1979); *Mincey* v. *Arizona*, 437 U. S. 385, 398 (1978), and its limited use would not eviscerate the deterrent effect of the exclusionary rule, the Court has held that it can be admitted for impeachment purposes. See *Oregon* v. *Hass*, 420 U. S. 714 (1975); *Harris* v. *New York*, 401 U. S. 222 (1971).

The same is not so with respect to the Sixth Amendment. The exclusion of statements made by a represented and indicted defendant outside the presence of counsel follows not as a remedy for a violation that has preceded trial but as a necessary incident of the constitutional right itself.[7]

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[7] As Professor Schulhofer has commented:

"[T]he *Massiah* 'exclusionary rule' is not merely a prophylactic device; it is not designed to reduce the *risk* of actual constitutional violations and is not

"[T]he Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland* v. *Washington*, 466 U. S. 668, 684 (1984). It is not implicated, as a general matter, in the absence of some effect of the challenged conduct on the trial process itself. See *United States* v. *Cronic*, 466 U. S., at 658; *Weatherford* v. *Bursey*, 429 U. S., at 558; see also *Nix* v. *Williams*, 467 U. S. 431, 456 (1984) (STEVENS, J., concurring in judgment). It is thus the use of the evidence for trial, not the method of its collection prior to trial, that is the gravamen of the Sixth Amendment claim. Although the defendant may not be entitled to a remedy in the form of reversal of the conviction if the evidence is harmless, that conclusion does not alter the fact that admission of the evidence is itself error. As we explained in *Massiah*, even when police investigation of a defendant may be "entirely proper," a defendant is "denied the basic protections of [the Sixth Amendment] guarantee when there [is] used against him at his trial evidence of his own incriminating words, which federal agents . . . deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U. S., at 206–207. See also *Maine* v. *Moulton*, 474 U. S., at 178–180. There is no reason why that rule should not apply here.

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intended to deter any pretrial behavior whatsoever. Rather, *Massiah* explicitly permits government efforts to obtain information from an indicted suspect, so long as that information is not used 'as evidence against *him* at his trial.' The failure to exclude evidence, therefore, cannot be considered *collateral* to some more fundamental violation. Instead it is the admission at trial that in itself denies the constitutional right." Confessions and the Court, 79 Mich. L. Rev. 865, 889 (1981) (footnote omitted).

See also Loewy, Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev. 907, 931 (1989) ("The justification for disallowing such evidence would not be the 'exclusionary rule,' but the sixth amendment's rules governing fair trials"); Wasserstrom & Mertens, The Exclusionary Rule on the Scaffold: But Was it a Fair Trial?, 22 Am. Crim. L. Rev. 85, 175 (1984).

The Court contents itself with the statement, drawn from *Oregon* v. *Hass*, *supra*, that there is only a "speculative possibility" that the State would be deterred from conducting a private interview with a represented defendant by a rule that excludes its product from use as impeachment at trial. *Ante*, at 351–352. Aside from the fact that the Court's assurance will provide scant comfort to the defendant, such as respondent, whose statement is admitted at trial, it is perfectly clear that the balance struck in *Hass* would not prevent the unlawful police and prosecutorial conduct here. The police misconduct in *Walder*, *Harris*, *Havens*, and *Hass* all occurred before the defendant had been formally charged, when the unsolved crime was still being investigated and the questioning of a suspect might be expected to produce evidence that is necessary to obtain an indictment. Knowledge that the improper conduct of an interrogation will destroy its use as substantive evidence provides a powerful incentive to follow the dictates of *Miranda* and its progeny with great care.

Once a defendant is formally charged with an offense, however, the State is no longer merely engaged in the task of determining who committed an unsolved crime; rather, it is preparing to convict the defendant of the crime he allegedly committed. "[T]he government's role shifts from investigation to accusation." *Moran* v. *Burbine*, 475 U. S., at 430. The State has obtained sufficient evidence to establish probable cause, see *Patterson* v. *Illinois*, 487 U. S., at 306 (STEVENS, J., dissenting), and the ethical prosecutor has sufficient admissible evidence to convict.[8] In practice, the investigation is often virtually complete.[9] Any subsequent investigation is a form of discovery.[10] The cost of an illegal interrogation is therefore greatly reduced. The police would have everything to gain and nothing to lose by repeatedly visiting with the defendant and seeking to elicit as many comments as possible about the pending trial. Knowledge that such conversations could not be used affirmatively would not detract from the State's interest in obtaining them for their value as impeachment evidence.[11]

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[8] See ABA Standards for Criminal Justice 3–3.9(a) (2d ed. 1980) ("It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction").

III

In my dissenting opinion in *Patterson* v. *Illinois*, 487 U. S., at 301–302, I expressed my concern about the Court's condonation of unethical forms of trial preparation.[12] I unsuccessfully argued that private interviews with a defendant conducted by the prosecutor for the purpose of obtaining evidence to be used against him at trial were so manifestly unfair that the practice should be flatly prohibited at any time after formal proceedings begin and the Sixth Amendment right attaches. The Court rejected my argument and held that a properly advised defendant whose right to counsel has not been implemented can validly waive his right to counsel after *Miranda* warnings have been administered. In explaining that holding, the Court recognized that the waiver issue cannot be resolved without "asking what purposes a lawyer can serve at the particular stage of the proceedings in question, and what assistance he could provide to an accused at that stage." 487 U. S., at 298. The Court identified the

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[9] Most of the evidence used in criminal prosecutions is compiled shortly after the offense and prior to the indictment. See *id.*, at 11·43 ("Normally, prosecutorial investigation will have been completed prior to the filing of the accusatory instrument"); L. Weinreb, Denial of Justice 47 (1977); Kaplan, The Prosecutorial Discretion—A Comment, 60 Nw. U. L. Rev. 174, 180 (1965).

[10] "The work of the agents was trial preparation, pure and simple. In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from 'procedural regularity' as to violate the due process clause of the Fifth Amendment." *United States* v. *Springer*, 460 F. 2d 1344, 1355 (CA7) (dissenting opinion) (footnote omitted), cert. denied, 409 U. S. 873 (1972).

[11] Moreover, the Court should not ignore the fact that its holding will inevitably discriminate against defendants who are too indigent to post bond. Those who are not held in custody after the attorney-client relationship has been formed are not exposed to daily contact with the police and therefore have little stake in the rule announced in this case. Because the indigent defendant has only occasional contact with his lawyer but is under the constant control of the prosecutor, it is he whose interests are most affected by the Court's ruling. The Court should at least pause before adopting a rule that can have such an obviously disparate impact on indigent defendants.

[12] "The Court should not condone unethical forms of trial preparation by prosecutors or their investigators. In civil litigation it is improper for a lawyer to communicate with his or her adversary's client without either notice to opposing counsel or the permission of the court. An attempt to ob-

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tain evidence for use at trial by going behind the back of one's adversary would be not only a serious breach of professional ethics but also a manifestly unfair form of trial practice. In the criminal context, the same ethical rules apply and, in my opinion, notions of fairness that are at least as demanding should also be enforced.

"After a jury has been impaneled and a criminal trial is in progress, it would obviously be improper for the prosecutor to conduct a private interview with the defendant for the purpose of obtaining evidence to be used against him at trial. By 'private interview' I mean, of course, an interview initiated by the prosecutor, or his or her agents, without notice to the defendant's lawyer and without the permission of the court." (Footnotes omitted.)

As a matter of ethics, the conduct of the officer here was plainly improper. Under the Michigan Rules of Professional Conduct, as under the ABA's Code of Professional Responsibility, a prosecutor may not talk to the defendant without first giving notice to his opposing counsel. See Mich. Rules of Professional Conduct, Rule 4.2 (1989); ABA Model Code of Professional Responsibility DR 7–104(A)(1) (1980). That ethical restraint also applies to agents of the prosecutor. See Mich. Rules of Professional Conduct, Rule 5.3 (1989); see also Tr. of Oral Arg. 11–12. Indeed, the House of Delegates of the American Bar Association has recently stressed that the requirements of DR 7–104(A)(1) are applicable to government prosecutors. ABA House of Delegates Report No. 301 (approved Feb. 12–13, 1990).

constitutional right as a "spectrum" with minimal protection at one extreme and the maximum at the other.

> "At the other extreme, recognizing the enormous importance and role that an attorney plays at a criminal trial, we have imposed the most rigorous restrictions on the information that must be conveyed to a defendant, and the procedures that must be observed, before permitting him to waive his right to counsel at trial. See *Faretta* v. *California*, 422 U. S. 806, 835–836 (1975); cf. *Von Moltke* v. *Gillies*, 332 U. S. 708, 723–724 (1948). In these extreme cases, and in others that fall between these two poles, we have defined the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel." *Ibid.*

In this case the Court has nothing to say about the point on this spectrum at which the interview with respondent took place and the standards that would be sufficient to establish a waiver of the Sixth Amendment right. At the outset, the Court seems to hold that impeachment is always permissible,[13] but in the end, after acknowledging that analysis of the waiver issue changes when a defendant obtains or requests counsel, *ante*, at 352, the Court simply asserts that the defendant must make "a knowing and voluntary waiver of the right to counsel." *Ante*, at 354.[14] The interview at issue in this case occurred after the right to counsel had been implemented, when respondent had been in custody for over two months and was to be tried in only a few days. Although the interview was conducted by a police officer rather than a lawyer, it was in many respects comparable to a pretrial deposition. The value of representation by counsel is evident. If respondent had been properly advised by counsel in preparation for such a deposition, he would have reviewed all of the facts he intended to describe in his trial testimony and been counseled not to omit any significant details, including presumably the three whose omission the State made use of as impeachment here.[15] Interrogation outside the presence of counsel at this advanced stage of the proceedings can impair counsel's representation of his client and interfere with trial strategy.

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[13] "The question presented in this case is whether the prosecution may use a statement taken in violation of the *Jackson* prophylactic rule to impeach a defendant's false or inconsistent testimony. We hold that it may do so." *Ante*, at 345–346.

[14] "[W]e need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel."

Regardless of whether or not the Court is prepared to accept a finding that respondent's participation in such a pretrial deposition was "voluntary"—as measured by some undisclosed standard—it surely denigrates the value of the constitutional interest in the assistance of counsel to condone such a shabby practice.

IV

Apparently as a means of identifying rules that it disfavors, the Court repeatedly uses the term "prophylactic rule." See *ante*, at 345, 349, 350, 351, and 353. It is important to remember, however, that all rules of law are prophylactic. Speed limits are an example; they are designed to prevent accidents. The Sixth Amendment is another; it is designed to prevent unfair trials. An argument that a rule of law may be ignored, avoided, or manipulated simply because it is "prophylactic" is nothing more than an argument against the rule of law itself. The tragedy of today's decision is not merely its denigration of the constitutional right at stake; it also undermines the principle that those who are entrusted with the power of government have the same duty to respect and obey the law as the ordinary citizen.

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[15] As the Court acknowledges, *ante*, at 347, and n. 2, the entire basis for the prosecutor's attempt to impeach respondent rested upon his failure to mention three details at his deposition. Respondent testified that he and the victim had smoked cocaine in the victim's house on the night of the incident and that another man and woman had been present during part of the time. App. 5–6. He testified at trial that he did not know the man's name, *id.*, at 36, but in the statement he had indicated that he "thought" his name was "Michael." *Id.*, at 37. Moreover, he also testified that this other man "had some caine, too, and he was smoking his. So we were like exchanging." *Id.*, at 39. But the statement had only mentioned cocaine that respondent had provided. *Ibid.* Finally, although respondent testified that he pushed the victim away after she threatened him with a fork, he neglected to mention during his deposition that he wrested the fork from her and threw it to the floor. *Id.*, at 44.

I respectfully dissent.

BOYDE *v.* CALIFORNIA

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

No. 88–6613. Argued November 28, 1989—Decided March 5, 1990

All of the evidence presented by petitioner Boyde during the penalty phase of his state-court capital murder trial related to his background and character. The trial court instructed the jury, *inter alia*, in accordance with instructions 8.84.1 and 8.84.2, 1 California Jury Instructions, Criminal (4th ed.) (CALJIC), both of which have since been amended. At the time, CALJIC 8.84.1 listed 11 factors that the jury "shall consider" in determining whether to impose a sentence of death or life imprisonment, the last of which was the so-called "unadorned version" of factor (k), which read: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The court also instructed the jury, pursuant to former CALJIC 8.84.2, to consider all applicable aggravating and mitigating circumstances, and directed that it "shall impose" a sentence either of death or of life imprisonment depending upon whether the aggravating circumstances outweighed the mitigating circumstances or vice versa. The jury imposed the death sentence, and the State Supreme Court affirmed, rejecting Boyde's contention that the aforesaid versions of CALJIC 8.84.1 and 8.84.2 violated the Eighth and Fourteenth Amendments.

Held:

1. The giving of former CALJIC 8.84.2 did not violate the Eighth Amendment. Boyde's claim that the mandatory nature of the instruction's "shall impose" language prevented the jury from making an "individualized assessment" of the death penalty's appropriateness is foreclosed by *Blystone* v. *Pennsylvania*, *ante*, p. 299, which rejected a challenge to an instruction with similar mandatory language, holding that the requirement of individualized capital sentencing is satisfied by allowing the jury to consider all relevant mitigating evidence. Boyde has not alleged that the instruction's mandatory language interfered with the consideration of such evidence. Moreover, there is no constitutional basis for his suggestion that the jury must have unfettered discretion to decline to impose the death penalty even if it decides that the aggravating circumstances "outweigh" the mitigating circumstances. States are free to structure and shape consideration of mitigating evidence to achieve a more rational and equitable administration of the death penalty. Pp. 376–377.

2. The giving of former CALJIC 8.84.1 did not violate the Eighth Amendment by precluding the jury from considering non-crime-related

factors, such as Boyde's background and character, as mitigating evidence. Pp. 377–386.

(a) Where, as here, the claim is that a challenged instruction is ambiguous and therefore subject to erroneous interpretation, the proper inquiry is whether there is a reasonable likelihood that the jury has applied the instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding does not violate the Eighth Amendment if there is only a possibility of such an inhibition. Pp. 378–381.

(b) There is not a reasonable likelihood that the jurors here interpreted the trial court's instructions to preclude consideration of mitigating evidence of Boyde's background and character. "Unadorned" factor (k) standing alone did not, as Boyde seems to suggest, limit the jury's consideration to "any other circumstance *of the crime*," but directed the jury to consider *any other circumstance* that might excuse a crime, which certainly includes background and character. Moreover, when factor (k) is viewed together with other CALJIC 8.84.1 factors allowing for consideration of mitigating evidence not associated with the crime itself—such as the absence of prior criminal activity by, or felony convictions of, the defendant, and youth—it seems even more improbable that the jurors would have arrived at an interpretation that precluded consideration of all non-crime-related evidence. Similarly, reasonable jurors surely would not have felt constrained by the factor (k) instruction to ignore *all* of Boyde's unobjected-to penalty-phase evidence—four days of testimony consuming over 400 pages of transcript—particularly since the jury was also instructed that it "*shall consider all of the evidence* . . . received during any part of the trial." Pp. 381–384.

(c) There is no merit to Boyde's assertion that arguments by the prosecutor immediately before the jury's sentencing deliberations made it likely that the jurors would adopt an impermissible interpretation of the factor (k) instruction. Such arguments generally carry less weight with a jury than do instructions from the court, are subject to objection and to correction by the court, and must be judged in the context in which they are made. Here, although the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered. In fact, he made statements that explicitly assumed that such evidence was relevant, and defense counsel stressed the necessity of a broad reading of factor (k). Pp. 384–386.

46 Cal. 3d 212, 758 P. 2d 25, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined, and in Parts I, II, III, and IV of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 386.

Dennis A. Fischer, by appointment of the Court, 493 U. S. 952, argued the cause for petitioner. With him on the briefs was *John M. Bishop*.

Frederick R. Millar, Jr., Supervising Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *John K. Van de Kamp*, Attorney General, *Richard B. Iglehart*, Chief Assistant Attorney General, *Harley D. Mayfield*, Senior Assistant Attorney General, and *Jay M. Bloom*, Supervising Deputy Attorney General.*

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

This case requires us to decide whether two California jury instructions used in the penalty phase of petitioner's capital murder trial and in other California capital cases before each was modified in 1983 and 1985, respectively, are consistent with the requirements of the Eighth Amendment. We hold that they are.

Petitioner Richard Boyde was found guilty by a jury in the robbery, kidnaping, and murder of Dickie Gibson, the night clerk at a 7-Eleven Store in Riverside, California. The State introduced evidence at trial that about 2:30 a.m. on January 15, 1981, Boyde entered the store and robbed the clerk at gunpoint of $33 from the cash register. Petitioner then

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*Briefs of *amici curiae* urging affirmance were filed for the State of Arizona et al. by *Robert K. Corbin*, Attorney General of Arizona, *Paul J. McMurdie*, Assistant Attorney General, and *Jessica Gifford Funkhauser*, and joined by the Attorneys General for their respective States as follows: *Donald Siegelman* of Alabama, *William L. Webster* of Missouri, *Marc Racicot* of Montana, *Lacy H. Thornburg* of North Carolina, *Anthony J. Celebrezze, Jr.*, of Ohio, *Ernest D. Preate, Jr.*, of Pennsylvania, and *Joseph B. Meyer* of Wyoming; and for the Criminal Justice Legal Foundation by *Kent S. Scheidegger* and *Charles L. Hobson*.

Richard C. Neuhoff and *Eric S. Multhaup* filed a brief for the California Appellate Project as *amicus curiae*.

forced Gibson into a waiting car, which was driven by petitioner's nephew, and the three men drove to a nearby orange grove. There, Boyde brought Gibson into the grove and ordered him to kneel down with his hands behind his head. As Gibson begged for his life, Boyde shot him once in the back of the head and again in the forehead, killing him. The jury returned a special verdict that Boyde personally committed the homicide with "express malice aforethought and premeditation and deliberation."

At the penalty phase of the trial, the jury was instructed, *inter alia*, in accordance with instructions 8.84.1 and 8.84.2, 1 California Jury Instructions, Criminal (4th ed. 1979) (CALJIC), both of which have since been amended. The former lists 11 factors that the jury "shall consider, take into account and be guided by" in determining whether to impose a sentence of death or life imprisonment.[1] The eleventh is a

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[1] The complete instruction provides:

"In determining which penalty is to be imposed on [each] defendant, you shall consider all of the evidence which has been received during any part of the trial of this case, [except as you may be hereafter instructed]. You shall consider, take into account and be guided by the following factors, if applicable:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) The presence or absence of any prior felony conviction.

"(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

"(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to "catch-all," factor (k), which reads: "Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[2] The court's concluding instruction, pursuant to CALJIC 8.84.2, again told the jury to consider all applicable aggravating and mitigating circumstances and followed with this direction: "If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole." (Emphasis added.)[3] After hear-

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the requirements of law was impaired as a result of mental disease or defect or the affects of intoxication.

"(i) The age of the defendant at the time of the crime.

"(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

[2] In *People* v. *Easley*, 34 Cal. 3d 858, 671 P. 2d 813 (1983), the Supreme Court of California stated that in order to avoid potential misunderstanding over the meaning of factor (k) in the future, trial courts "should inform the jury that it may consider as a mitigating factor 'any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime' and any other 'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" *Id.*, at 878, n. 10, 671 P. 2d, at 826, n. 10 (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion)). CALJIC 8.84.1 has since been formally amended and the present factor (k) instruction directs the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial . . .]." 1 California Jury Instructions, Criminal 8.85(k) (5th ed. 1988).

[3] In *People* v. *Brown*, 40 Cal. 3d 512, 726 P. 2d 516 (1986), the Supreme Court of California acknowledged that the "shall impose" language of instruction 8.84.2 "le[ft] room for some confusion as to the jury's role." *Id.*, at 544, n. 17, 726 P. 2d, at 534, n. 17. The court believed that the Eighth and Fourteenth Amendments required that the jury have the discretion to

ing six days of testimony concerning the appropriate penalty, the jury returned a verdict imposing the sentence of death, and the trial court denied Boyde's motion to reduce the sentence.

On appeal, the Supreme Court of California affirmed. 46 Cal. 3d 212, 758 P. 2d 25 (1988). It rejected petitioner's contention that the jury instructions violated the Eighth Amendment because the so-called "unadorned version" of factor (k) did not allow the jury to consider mitigating evidence of his background and character. The court noted that all of the defense evidence at the penalty phase related to Boyde's background and character, that the jury was instructed to consider "'all of the evidence which has been received during any part of the trial of this case,'" and that the prosecutor "never suggested that the background and character evidence could not be considered." *Id.*, at 251, 758 P. 2d, at 47. Therefore, the court found it "inconceivable the jury would have believed that, though it was permitted to hear defend-

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decide whether, under all of the relevant circumstances, a defendant deserves the punishment of death or life without parole, *id.*, at 540, 726 P. 2d, at 531, and stated that each case in which the mandatory language was used "must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law." *Id.*, at 544, n. 17, 726 P. 2d, at 534, n. 17. The court noted that a proposed instruction, which has since been adopted almost verbatim, see 1 CALJIC 8.88 (5th ed. 1988), would conform to its opinion: "'The weighing of aggravating and mitigating circumstances does not mean a mere mechanical weighing of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating evidence [circumstances] is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.'" 40 Cal. 3d, at 545, n. 19, 726 P. 2d, at 535, n. 19.

ant's background and character evidence and his attorney's lengthy argument concerning that evidence, it could not consider that evidence." *Ibid.*

With regard to the "shall impose" language of CALJIC 8.84.2, the court agreed with petitioner that the instruction could not permissibly require a juror to vote for the death penalty "'unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances.'" 46 Cal. 3d, at 253, 758 P. 2d, at 48 (quoting *People* v. *Brown*, 40 Cal. 3d 512, 541, 726 P. 2d 516, 532 (1985)). It concluded, however, that in this case "[t]he jury was adequately informed as to its discretion in determining whether death was the appropriate penalty." 46 Cal. 3d, at 253, 758 P. 2d, at 48. Three justices dissented from the court's affirmance of the death sentence. The dissenters argued that the mandatory feature of instruction 8.84.2 misled the jury into believing that it was required to impose the death penalty if the aggravating factors "outweighed" the mitigating factors, even though an individual juror might not have thought death was the appropriate penalty in this case. *Id.*, at 257–266, 758 P. 2d, at 51–57. We granted certiorari, 490 U. S. 1097 (1989), and now affirm.

Petitioner reiterates in this Court his argument that the mandatory nature of former CALJIC 8.84.2 resulted in a sentencing proceeding that violated the Eighth Amendment, because the instruction prevented the jury from making an "individualized assessment of the appropriateness of the death penalty." See *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989). Specifically, Boyde contends that the "shall impose" language of the jury instruction precluded the jury from evaluating the "absolute weight" of the aggravating circumstances and determining whether they justified the death penalty. He further asserts that the jury was prevented from deciding whether, in light of all the aggravating and mitigating evidence, death was the appropriate penalty. In response, the State argues that the sentencing proceeding was consistent with the Eighth Amendment, because a reasonable juror would interpret the instruction as allowing for the exercise of discretion and moral judgment about the appropriate penalty in the process of weighing the aggravating and mitigating circumstances.

We need not discuss petitioner's claim at length, because we conclude that it is foreclosed by our decision earlier this Term in *Blystone* v. *Pennsylvania*, *ante*, p. 299. In *Blystone*, we rejected a challenge to an instruction with similar mandatory language, holding that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Ante*, at 307. Although Blystone, unlike Boyde, did not present any mitigating evidence at the penalty phase of his capital trial, the legal principle we expounded in *Blystone* clearly requires rejection of Boyde's claim as well, because the mandatory language of CALJIC 8.84.2 is not alleged to have interfered with the consideration of mitigating evidence. Petitioner suggests that the jury must have freedom to decline to impose the death penalty even if the jury decides that the aggravating circumstances "outweigh" the mitigating circumstances. But there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion). Petitioner's claim that the "shall impose" language of CALJIC 8.84.2 unconstitutionally prevents "individualized assessment" by the jury is thus without merit.

The second issue in this case is whether petitioner's capital sentencing proceedings violated the Eighth Amendment because the trial court instructed the jury in accordance with former CALJIC 8.84.1, including the "unadorned" factor (k). The Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner. See *Lockett* v. *Ohio*, 438 U. S. 586 (1978); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); *Penry*, *supra*. In assessing the effect of a challenged jury instruction, we follow the familiar rule stated in *Cupp* v. *Naughten*, 414 U. S. 141 (1973):

> "In determining the effect of this instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. *Boyd* v. *United States*, 271 U. S. 104, 107 (1926)." *Id.*, at 146–147.

Petitioner contends that none of the 11 statutory factors in CALJIC 8.84.1 allowed the jury to consider non-crime-related factors, such as his background and character, which might provide a basis for a sentence less than death. Nine of the factors, he argues, focused only on the immediate circumstances of the crime itself. Two others, factors (b) and (c), which center on the presence or absence of prior violent criminal activity and prior felony convictions, were in petitioner's view simply vehicles for the consideration of aggravating evidence not directly related to the crime. Finally, petitioner claims that the "catchall" factor (k) did not allow the jury to consider and give effect to non-crime-related mitigating evidence, because its language—"[a]ny other circumstance which extenuates the gravity of the crime"—limited the jury to other evidence that was *related to the crime*.

The legal standard for reviewing jury instructions claimed to restrict impermissibly a jury's consideration of relevant evidence is less than clear from our cases. In *Francis* v. *Franklin*, 471 U. S. 307 (1985), we said that "[t]he question . . . is . . . what a reasonable juror *could have understood* the charge as meaning." *Id.*, at 315–316 (emphasis added). See also *Sandstrom* v. *Montana*, 442 U. S. 510, 516–517 (1979). But our subsequent decisions, while sometimes purporting to apply the *Francis* standard, have not adhered strictly to that formulation. In *California* v. *Brown*, 479 U. S. 538, 541–542 (1987), we made reference both to what a reasonable juror "*could*" have done and what he "*would*" have done. And two Terms ago in *Mills* v. *Maryland*, 486 U. S. 367 (1988), we alluded to at least three different inquiries for evaluating such a challenge: whether reasonable jurors "*could have*" drawn an impermissible interpretation from the trial court's instructions, *id.*, at 375–376 (emphasis added); whether there is a "*substantial possibility* that the jury may have rested its verdict on the 'improper' ground," *id.*, at 377 (emphasis added); and how reasonable jurors "*would have*" applied and understood the instructions. *Id.*, at 389 (WHITE, J., concurring) (emphasis added). Other opinions in the area likewise have produced a variety of tests and standards. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S., at 326 ("[A] reasonable juror *could well have believed* that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence") (emphasis added); *Franklin* v. *Lynaugh*, *supra*, at 192 (STEVENS, J., dissenting) ("[N]either of the Special Issues as they *would have been understood by reasonable jurors* gave the jury the opportunity to consider petitioner's mitigating evidence") (emphasis added); see also *Andres* v. *United States*, 333 U. S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning . . . *is probable*") (emphasis added).

Although there may not be great differences among these various phrasings, it is important to settle upon a single formulation for this Court and other courts to employ in deciding this kind of federal question. Our cases, understandably, do not provide a single standard for determining whether various claimed errors in instructing a jury require reversal of a conviction. In some instances, to be sure, we have held that "when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside. See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359 (1931)." *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); see also *Bachellar* v. *Maryland*, 397 U. S. 564, 571 (1970). In those cases, a jury is clearly instructed by the court that it may convict a defendant on an impermissible legal theory, as well as on a proper theory or theories. Although it is possible that the guilty verdict may have had a proper basis, "it is equally likely that the verdict . . . rested on an unconstitutional ground," *Bachellar*, *supra*, at 571, and we have declined to choose between two such likely possibilities.

In this case we are presented with a single jury instruction. The instruction is not concededly erroneous, nor found so by a court, as was the case in *Stromberg* v. *California*, 283 U. S. 359 (1931). The claim is that the instruction is ambiguous and therefore subject to an erroneous interpretation. We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation.[4] Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

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[4] In other contexts, we have held that a defendant cannot establish a constitutional violation simply by demonstrating that an alleged trial-

Applying this standard to factor (k) of CALJIC 8.84.1 standing alone, we think there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character. The jury was instructed, according to factor (k), that "you shall consider . . . [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and the term "extenuate" was defined by the court to mean "to lessen the seriousness of a crime as by giving an excuse." App. 34. Petitioner contends that this instruction did not permit the jury to give effect to evidence—presented by psychologists, family, and friends—of his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles. But as we explained last

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related error could or might have affected the jury. To establish that ineffective assistance of counsel violates the Sixth Amendment, for example, a defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). Deportation of potential defense witnesses does not violate due process unless "there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." *United States* v. *Valenzuela-Bernal*, 458 U. S. 858, 874 (1982). And failure of the prosecution to disclose allegedly exculpatory evidence to the defense violates due process "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States* v. *Bagley*, 473 U. S. 667, 682 (1985). To receive a new trial based on newly discovered evidence, a defendant must demonstrate that the evidence would more likely than not lead to a different outcome. See *INS* v. *Abudu*, 485 U. S. 94, 107, n. 12 (1988).

Term in *Penry* v. *Lynaugh:* "'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*'" 492 U. S., at 319 (quoting *California* v. *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring)) (emphasis added). Petitioner had an opportunity through factor (k) to argue that his background and character "extenuated" or "excused" the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, "long held by society," that in an appropriate case such evidence would counsel imposition of a sentence less than death. The instruction did not, as petitioner seems to suggest, limit the jury's consideration to "any other circumstance *of the crime* which extenuates the gravity of the crime." The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character.[5]

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[5] The dissent focuses on the terms "gravity" and "seriousness" and argues that background and character evidence has no effect on the seriousness of the crime. But the jury was instructed to consider any circumstance which "*extenuates* the gravity of the crime even though it is not a legal excuse for the crime" or "lessens the seriousness of a crime *as by giving an excuse.*" The instruction directs the jury to consider "any other circumstance" which might provide such an excuse, and we think jurors would naturally consider background and character as a possible excuse.

At oral argument (though not in his brief), counsel for petitioner also argued that testimony that Boyde won a prize for his dance choreography while in prison showed that he could lead a useful life behind bars, and that the jury must be able to consider that evidence as a mitigating circumstance under our decision in *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). Factor (k), he argued, did not allow for such consideration. In *Skipper*, we held that a capital defendant must be permitted to introduce in mitigation evidence of postcrime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life imprisonment rather than death. The testimony that petitioner had won a dance contest

Even were the language of the instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation. Other factors listed in CALJIC 8.84.1 allow for consideration of mitigating evidence not associated with the crime itself, such as the absence of prior criminal activity by a defendant, the absence of prior felony convictions, and youth. When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all non-crime-related evidence.

All of the defense evidence presented at the penalty phase—four days of testimony consuming over 400 pages of trial transcript—related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe the court's instructions transformed all of this "favorable testimony into a virtual charade." *California* v. *Brown*, *supra*, at 542. The jury was instructed that it "*shall consider all of the evidence* which has been received during any part of the trial of this case," App. 33 (emphasis added), and in our view reasonable jurors surely would not have felt constrained by the factor (k) instruction to *ignore all* of the evi-

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while in prison, however, was introduced not to demonstrate that he was a "model prisoner" like Skipper and therefore unlikely to present a risk of future dangerousness, but to show that he had artistic ability. Tr. 4607–4608. Moreover, although the record is not clear on this point, petitioner apparently won the dance prize during a prison term served *prior* to the Gibson murder, and the evidence thus did not pertain to prison behavior after the crime for which he was sentenced to death, as was the case in *Skipper*. The testimony about dancing ability was presented as part of petitioner's overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties. As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character.

dence presented by petitioner during the sentencing phase. Presentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous. This case is unlike those instances where we have found broad descriptions of the evidence to be considered insufficient to cure statutes or instructions which clearly directed the sentencer to disregard evidence. See, *e. g.*, *Hitchcock* v. *Dugger*, 481 U. S. 393, 398–399 (1987) ("[I]t could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances . . ."); *Lockett*, 438 U. S., at 608 (plurality opinion) (Even under Ohio's "liberal" construction of the death penalty statute, "only the three factors specified in the statute can be considered in mitigation of the defendant's sentence").

Petitioner also asserts that arguments by the prosecutor immediately before the jury's sentencing deliberations reinforced an impermissible interpretation of factor (k) and made it likely that jurors would arrive at such an understanding. But arguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, see Tr. 3933, and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law. See *Carter* v. *Kentucky*, 450 U. S. 288, 302–304, and n. 20 (1981); *Quercia* v. *United States*, 289 U. S. 466, 470 (1933); *Starr* v. *United States*, 153 U. S. 614, 626 (1894). Arguments of counsel which misstate the law are subject to objection and to correction by the court. *E. g.*, *Greer* v. *Miller*, 483 U. S. 756, 765–766, and n. 8 (1987). This is not to say that prosecutorial misrepresentations may never have a decisive effect on the jury, but only that they are not to be judged as having the same force as an instruction from the court. And the arguments of counsel, like the instructions of the court, must be judged in the context in which they are made. *Greer*, *supra*, at 766; *Darden* v. *Wainwright*, 477 U. S. 168, 179 (1986); *United States* v. *Young*, 470 U. S. 1, 11–12 (1985); see also *Donnelly* v. *DeChristoforo*, 416 U. S. 637, 647 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

We find no objectionable prosecutorial argument in this case. Petitioner maintains that the prosecutor encouraged an intolerably narrow view of factor (k) when he argued to the jury that the mitigating evidence did not "suggest that [petitioner's] crime is less serious or that the gravity of the crime is any less," App. 24, and that "[n]othing I have heard lessens the seriousness of this crime." *Id.*, at 29. But we agree with the Supreme Court of California, which was without dissent on this point, that "[a]lthough the prosecutor argued that in his view the evidence did not sufficiently mitigate Boyde's conduct, he never suggested that the background and character evidence could not be considered." 46 Cal. 3d, at 251, 758 P. 2d, at 47. His principal tack was not to contend that background and character were irrelevant, but to urge the jury that despite petitioner's past difficulties, he must accept responsibility for his actions. See App. 28–30. Indeed, the prosecutor explicitly assumed that petitioner's character evidence was a proper factor in the weighing process, but argued that it was minimal in relation to the aggravating circumstances:

> "The Defendant can dance. The Defendant . . . may have some artistic talent. The Defendant may, in fact, have been good with children. During the course of twenty-four years, even on a basis of just random luck, you are going to have to have picked up something or

> done something . . . we can all approve of, *but if you consider that on the weight that goes against it, . . . it is not even close.*" Tr. 4820–4821 (emphasis added).

Defense counsel also stressed a broad reading of factor (k) in his argument to the jury: "[I]t is almost a catchall phrase. Any other circumstance, and it means just that, any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse." App. 31.[6]

In sum, we conclude there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner. We thus hold that the giving of the jury instructions at issue in this case, former CALJIC 8.84.1 and 8.84.2, did not violate the Eighth and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of California is

Affirmed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Parts I, II, III, and IV, dissenting.

It is a bedrock principle of our capital punishment jurisprudence that, in deciding whether to impose a sentence of death, a sentencer must consider not only the nature of the offense but also the "'character and propensities of the offender.'" *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion) (quoting *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 55 (1937)); see also *ante*, at 381–382. Without question, our commitment to individualized sentencing in capital proceedings provides some hope that we can avoid administering the death penalty "discriminatorily, wantonly and freakishly." *Gregg* v. *Georgia* 428 U. S. 153, 220–221 (1976) (WHITE, J., concurring in judgment) (footnotes omitted). The insistence in our law that the sentencer know and consider the defendant as a human being before deciding whether to impose the ultimate sanction operates as a shield against arbitrary execution and enforces our abiding judgment that an offender's circumstances, apart from his crime, are relevant to his appropriate punishment.

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[6] We find no merit to the contention of petitioner and *amicus* that arguments of prosecutors in *other* California cases bear on the validity of the factor (k) instruction in this case. Petitioner's jury obviously was not influenced by comments made in other California capital trials. Nor do we think the fact that prosecutors in other cases may have pressed a construction of factor (k) that would cause the sentencing proceedings to violate the Eighth Amendment means that reasonable jurors are likely to have arrived at an such an interpretation. Prosecutors are interested advocates, and the arguments that one or more prosecutors may have made in urging a particular construction of factor (k) in other cases is not a weighty factor in deciding whether the jury in petitioner's case would have felt precluded from considering mitigating evidence.

The Court holds today that Richard Boyde's death sentence must be affirmed even if his sentencing jury reasonably could have believed that it could not consider mitigating evidence regarding his character and background. Eschewing the fundamental principle that "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments," *Lockett* v. *Ohio*, 438 U. S. 586, 605 (1978), the Court adopts an unduly stringent standard for reviewing a challenge to a sentencing instruction alleged to be constitutionally deficient. Under the majority's approach, a capital sentence will stand unless "there is a reasonable likelihood that the jury has applied the challenged instruction" unconstitutionally. *Ante*, at 380. Because the majority's "reasonable likelihood" standard is not met where a "'reasonable' juror could or might have interpreted" a challenged instruction unconstitutionally, *ibid.* that standard is inconsistent with our longstanding focus, in reviewing challenged instructions in all criminal contexts, on whether a juror *could* reasonably interpret the instructions in an unconstitutional manner. See.

e. g., Sandstrom v. *Montana*, 442 U. S. 510 (1979). Even more striking, the majority first adopts this standard in its review of a capital sentencing instruction. I have long shared this Court's assessment that death is qualitatively different from all other punishments, see *Spaziano* v. *Florida*, 468 U. S. 447, 468, and n. 2 (1984) (STEVENS, J., concurring in part and dissenting in part) (collecting cases), but I have never understood this principle to mean that we should review death verdicts with less solicitude than other criminal judgments. By adopting its unprecedented standard, the majority places too much of the risk of error in capital sentencing on the defendant.

Further, the majority's conclusion that "there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence," *ante*, at 386, is belied by both the plain meaning of the instructions and the context in which they were given. Because the instructions given to Boyde's jury were constitutionally inadequate under *any* standard, including the one adopted by the Court today, I dissent.

I

At the penalty phase of his trial, Richard Boyde presented extensive mitigating evidence regarding his background and character. He presented testimony regarding his impoverished background, his borderline intelligence, his inability to get counseling, and his efforts to reform. Friends and family testified that, notwithstanding his criminal conduct, Boyde possesses redeeming qualities, including an ability to work well with children.

In accordance with California's then-operative capital jury instructions, the trial court instructed the jury that it should "consider, take into account and be guided by" 11 sentencing factors in deciding whether to return a verdict of death. 1 California Jury Instructions, Criminal 8.84.1 (4th ed. 1979) (CALJIC). Because none of these factors explicitly informed the jury that it could consider evidence of a defendant's background and character, see *People* v. *Easley*, 34 Cal. 3d 858, 878, 671 P. 2d 813, 825 (1983), Boyde argues that the trial court's instructions were constitutionally inadequate. The State responds that the instructions fully informed the jury of its responsibility to consider character and background evidence through factor (k), which provided that a jury could consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Boyde replies that a reasonable juror could have understood factor (k) as permitting consideration only of evidence related to the circumstances of the crime.

II

It is an essential corollary of our reasonable-doubt standard in criminal proceedings that a conviction, capital or otherwise, cannot stand if the jury's verdict *could* have rested on unconstitutional grounds. See, *e. g.*, *Stromberg* v. *California*, 283 U. S. 359, 367–368 (1931); *Williams* v. *North Carolina*, 317 U. S. 287, 291–292 (1942); *Cramer* v. *United States*, 325 U. S. 1, 36, n. 45 (1945); *Yates* v. *United States*, 354 U. S. 298, 312 (1957); *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); *Bachellar* v. *Maryland*, 397 U. S. 564, 571 (1970); see also *Chapman* v. *California*, 386 U. S. 18, 24 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). In a society that values the presumption of innocence and demands resolution of all reasonable doubt before stripping its members of liberty or life, the decision to leave undisturbed a sentence of death that could be constitutionally infirm is intolerable.

Contrary to the majority's intimation that the legal standard is "less than clear from our cases," see *ante*, at 378, we have firmly adhered to a strict standard in our review of challenged jury instructions. In *Sandstrom* v. *Montana*, *supra*, the petitioner claimed that the trial court's instructions unconstitutionally shifted to him the burden of proof regarding his intent at the time of the crime. Rejecting the State's claim that the jury might not have understood the instruction in an unconstitutional manner, we declared that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction." *Id.*, at 514 (emphasis added). Because we had "no way of knowing that Sandstrom was not convicted on the basis of the unconstitutional instruction," *id.*, at 526, we held that his conviction must be set aside. Likewise, in *Francis* v. *Franklin*, 471 U. S. 307, 319 (1985), we applied *Sandstrom* to invalidate a conviction where "a reasonable juror could . . . have understood" that the instructions placed the burden of proof on the defendant. We emphasized that the "[t]he question . . . is not what the State Supreme Court declares the meaning of the charge to be, but rather what a reasonable juror *could have understood the charge as meaning*." 471 U. S., at 315–316 (citing *Sandstrom*, *supra*, at 516–517) (emphasis added).

Sandstrom is equally applicable to claims challenging the constitutionality of capital sentencing instructions. See, *e. g.*, *California* v. *Brown*, 479 U. S. 538, 541 (1987) (in deciding whether a "mere sympathy" instruction impermissibly excludes consideration of mitigating evidence, "'[t]he question . . . [is] what a reasonable juror could have understood the charge as meaning'") (quoting *Francis*, *supra*, at 315–316). As recently as *Mills* v. *Maryland*, 486 U. S. 367 (1988), this Court unequivocally confirmed that, in reviewing sentencing instructions alleged to preclude full consideration of mitigating circumstances, "[t]he critical question . . . is whether petitioner's interpretation of the sentencing process is one a reasonable jury *could* have drawn from the instructions given by the trial judge." *Id.*, at 375–376 (citing *Francis*, *supra*, at 315–316; *Sandstrom*, 442 U. S., at 516–517; and *Brown*, *supra*, at 541) (emphasis added).

These cases leave no doubt as to the appropriate standard of review.[1] To be sure, the *dissent* in *Francis* disagreed with what it acknowledged to be "the Court's legal standard, which finds constitutional error where a reasonable juror *could* have understood the charge in a particular manner." 471 U. S., at 332 (REHNQUIST, J., dissenting). But the *Francis* majority squarely and unqualifiedly rejected the dissent's proposal that, for constitutional error to be found, there must be something more than a "reasonable possibility of an unconstitutional understanding" of the challenged instruction. *Id.*, at 323, n. 8. As the *Francis* Court stated, "it has been settled law since *Stromberg* v. *California*, 283 U. S. 359 (1931), that when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Ibid.*

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[1] The majority attributes some of the uncertainty regarding the proper standard to this Court's decision in *Andres* v. *United States*, 333 U. S. 740, 752 (1948), quoting the Court as follows: "'That reasonable men might derive a meaning from the instructions given other than the proper meaning . . . *is probable*." *Ante*, at 379 (ellipsis and emphasis added by majority). The majority fails to quote the Court's following sentence, in which the Court declared that "[i]n death cases doubts such as those presented here should be resolved in favor of the accused." 333 U. S., at 752. Read in context, the passage suggests only that in a case where an instruction was probably misinterpreted, any doubt must be resolved in favor of the accused; it does not suggest, as the majority implies, that it *must* be probable that an instruction could be misinterpreted before a conviction will be overturned.

The majority likewise mischaracterizes this Court's holding in *Bachellar* v. *Maryland*, 397 U. S. 564, 571 (1970). The majority suggests that *Bachellar* turned on the fact that it was "'equally likely that the verdict . . . rested on an unconstitutional ground,'" *ante*, at 380 (quoting 397 U. S., at 571) (ellipsis added by majority), and that *Bachellar* thus reflects only our refusal "to choose between two such likely possibilities," *ante*, at 380. The majority's misrepresentation of the *Bachellar* holding becomes apparent when the ellipsis inserted by the majority is removed:

> "[S]o far as we can tell, it is equally likely that the verdict resulted 'merely because [petitioners' views about Vietnam were] themselves offensive to their hearers.' *Street* v. *New York*, [394 U. S. 576, 592 (1969)]. Thus, since petitioners' convictions *could have rested on an unconstitutional ground*, they must be set aside." 397 U. S., at 571 (emphasis added).

As the complete quotation makes clear, the *holding* in *Bachellar* is that a conviction cannot stand if it "could have rested on an unconstitutional ground." The Court's observation that, in the case before it, the verdict was "equally likely" to be unconstitutional was just that—an observation. See also *id.*, at 569 ("[I]n light of the instructions given by the trial judge, the jury *could* have rested its verdict on a number of grounds") (emphasis added).

The majority defends the adoption of its "reasonable likelihood" standard on the ground that it "better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical 'reasonable' juror could or might have interpreted the instruction." *Ante*, at 380. The majority fails, however, to explain how the new standard differs from *Sandstrom*'s "could have" standard other than to suggest that the new standard, unlike *Sandstrom*'s, requires more than "speculation" to overturn a capital sentence. *Ibid.* It is difficult to conceive how a *reasonable* juror *could* interpret an instruction unconstitutionally where there is no "reasonable likelihood" that a juror would do so. Indeed, if the majority did not explicitly allow for such a possibility, lower courts would have good reason to doubt that the two standards were different at all; the majority's more stringent version of the "reasonable likelihood" standard is inconsistent with the cases from which the majority appropriates that standard.

The "reasonable likelihood" language first appeared in *Napue* v. *Illinois*, 360 U. S. 264 (1959), in which the Court reversed a state-court determination that a prosecutor's failure to correct perjured testimony did not affect the verdict. The Court rejected the claim that it was "bound by [the state court's] determination that the false testimony could not *in any reasonable likelihood* have affected the judgment of the jury." *Id.*, at 271 (emphasis added). Based on its own review of the record, the Court overturned the defendant's conviction because the false testimony "*may have had an effect on the outcome of the trial.*" *Id.*, at 272 (emphasis added). The language in *Napue* thereafter provided the governing standard for determining whether a prosecutor's knowing use of perjured testimony mandates reversal of a sentence. See *United States* v. *Bagley*, 473 U. S. 667, 679, n. 9 (1985) (opinion of BLACKMUN, J.).

As JUSTICE BLACKMUN explained in *Bagley*, the "reasonable likelihood" standard should be understood to be an equivalent of the "harmless error" standard adopted in *Chapman* v. *California:*

> "The rule that a conviction be obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict derives from *Napue* v. *Illinois*. *Napue* antedated *Chapman* v. *California*, 386 U. S. 18 (1967), where the 'harmless beyond a reasonable doubt' standard was established. The Court in *Chapman* noted that there was little, if any, difference between a rule formulated, as in *Napue*, in terms of 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction,' and a rule 'requiring the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' 386 U. S., at 24. It is therefore clear . . . that this Court's precedents indicate that the standard of review applicable to the knowing use of perjured testimony is equivalent to the *Chapman* harmless-error standard." 473 U. S., at 679–680, n. 9 (citations and internal quotation marks omitted).

The history of the "reasonable likelihood" standard thus confirms that the majority's version of the standard has no precedential support; where the Court has used "reasonable likelihood" language in the past, it has regarded such language as focusing, no less than the standards in *Chapman* and *Sandstrom,* on whether an error *could* have affected the outcome of a trial. See *supra*, at 389–393.[2]

To the extent the Court's new standard does require a defendant to make a greater showing than *Sandstrom*, the malleability of the standard encourages ad hoc review of challenged instructions by lower courts. Although the standard, as the majority adopts it, requires a defendant challenging the constitutionality of an instruction to demonstrate more than a reasonable "possibility" that his jury was "impermissibly inhibited by the instruction," a defendant "need not establish that the jury . . . more likely than not" was misled. *Ante*, at 380. Beyond this suggestion that error must be more than possible but less than probable, the Court is silent. Thus, appellate courts, familiar with applying the *Sandstrom* standard to ambiguous instructions, are now required to speculate whether an instruction that *could* have been misunderstood creates a "reasonable likelihood" that it was in fact misunderstood. *Ante*, at 380. I cannot discern how principled review of alleged constitutional errors is advanced by this standard.[3] That this Court has regarded the two standards as identical in prior cases, see *supra*, at 393, will no doubt contribute to confusion in the lower courts.

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[2] That the majority perceives little difference between our longstanding approach to challenged jury instructions and its reformulated "reasonable likelihood" standard suggests an alarming insensitivity to the premises underlying our criminal justice system. Just as the "reasonable doubt" standard at trial reflects our awareness of the meaning and serious consequences that our society attaches to a criminal conviction, the insistence on reasonable certainty in the correctness of capital sentencing instructions is commensurate with our heightened concern for accuracy in capital proceedings. Thus, the majority's assertion that "there may not be great differences among these various phrasings," *ante*, at 379, is unfounded. To the contrary, in reviewing criminal judgments we have described the difference between a standard that demands reasonable certainty on the one hand, and one that tolerates significant doubt on the other, as the difference that sets apart "a society that values the good name and freedom of every individual." *In re Winship*, 397 U. S. 358, 363–364 (1970).

More fundamentally, the majority offers no persuasive basis for altering our standard of review regarding capital instructions alleged to be constitutionally infirm. Despite the majority's declaration to the contrary, our "strong policy in favor of accurate determination of the appropriate sentence in a capital case" is *not* equaled by our "strong policy against retrials" based on alleged deficiencies in jury instructions. *Ante*, at 380. We have long embraced a commitment to resolving doubts about the accuracy of a death verdict in favor of a capital defendant. See, *e. g.*, *Beck* v. *Alabama*, 447 U. S. 625, 637 (1980) ("[T]he risk of an unwarranted conviction . . . cannot be tolerated in a case in which the defendant's life is at stake"). Indeed, to characterize our commitment to accurate capital verdicts as a "policy" is inappropriately dismissive of our heightened dedication to fairness and accuracy in capital proceedings. See, *e. g.*, *Bullington* v. *Missouri*, 451 U. S. 430, 445–446 (1981); *Woodson*, 428 U. S., at 304 (plurality opinion).

Moreover, the finality concerns to which the majority alludes are far less compelling in this context than the majority suggests. In addressing certain post-trial challenges to presumptively valid convictions, this Court has identified specific justifications for requiring a heightened showing by a defendant. Thus, the Court demands a showing greater than the "possibility" of error in reviewing a defendant's request for a new trial based on newly discovered evidence, *INS* v. *Abudu*, 485 U. S. 94, 107, n. 12 (1988), because the "finality concerns are somewhat weaker" in the context of such claims. *Strickland* v. *Washington*, 466 U. S. 668, 694 (1984). Our adoption of this "high standard for newly discovered evidence claims presuppose[d] that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result [was] challenged." *Ibid.*

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[3] Our repudiation of such a malleable standard in *Francis* v. *Franklin*, 471 U. S. 307 (1985), where we rejected a proposed "more likely than not" standard, is no less applicable here:

"This proposed alternative standard provides no sound basis for appellate review of jury instructions. Its malleability will certainly generate inconsistent appellate results and thereby compound the confusion that has plagued this area of the law. Perhaps more importantly, the suggested approach provides no incentive for trial courts to weed out potentially infirm language from jury instructions . . . ." *Id.*, at 322–323, n. 8.

Likewise, in *Strickland*, the Court held that a defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Ibid.* In adopting this more demanding standard, the Court relied heavily on the special circumstances which give rise to ineffective-assistance claims. In particular, the Court emphasized the government's inability to assure a defendant effective counsel in a given case and the difficulties reviewing courts face in discerning the precise effects of various representation-related errors:

> "Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Id.*, at 693.

For these reasons, the Court in *Strickland* refused to overturn a verdict whenever a defendant shows that the errors of his attorney "had some conceivable effect on the outcome of the proceeding." *Ibid.* Instead, the Court determined that the "reasonable probability" test more appropriately addresses the risk of error that attaches to ineffective-assistance claims in light of the fact that *all* trial decisions have *some* effect on the course of a trial.

In contrast, this case does not require the Court to relitigate facts or to speculate about the possible effects of alternative representation strategies that Boyde's counsel might have pursued at trial. Quite simply, the issue here is whether the trial court properly instructed the jury regarding its capital sentencing role. Such a challenge goes to the core of the accuracy of the verdict; it asks whether the defendant was sentenced by the jury according to the law. *Bollenbach* v. *United States*, 326 U. S. 607, 613 (1946) ("A conviction ought not to rest on an equivocal direction to the jury on a basic issue"). In such a circumstance, a capital defendant's interest in an exacting review of the alleged error is unquestionably at its height, because there is no "presumptive validity" regarding the jury's sentence. The State, on the other hand, retains no strong reliance interest in sustaining a capital verdict that may have been obtained based on a misunderstanding of the law.

Our refusal to apply a standard less protective than "reasonable doubt" to alleged errors in criminal trials in part guarantees the reliability of the jury's determination. But it also reflects our belief that appellate courts should not "invad[e] [the] factfinding function which in a criminal case the law assigns solely to the jury." *Carella* v. *California*, 491 U. S. 263, 268 (1989) (SCALIA, J., concurring in judgment) (internal quotation marks omitted; citations omitted). Thus, where jury instructions are unclear, an appellate court may not choose the preferred construction because "[t]o do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." *Bollenbach*, *supra*, at 614.

This reasoning is no less applicable to California's capital sentencing proceedings, in which the factfinding function is assigned to the jury. See *Hicks* v. *Oklahoma*, 447 U. S. 343, 346 (1980) (where defendant "has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion," it violates due process to affirm his sentence "simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh" had they been properly instructed). To ignore a reasonable possibility that jurors were misled about the range of mitigating evidence that they could consider is to undermine confidence that the *jury* actually decided that Boyde should be sentenced to death in accordance with the law. It overrides California's "fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Duncan* v. *Louisiana*, 391 U. S. 145, 156 (1968).

Accordingly, I would review the challenged instructions in this case to determine whether a reasonable juror *could* have understood them to preclude consideration of mitigating evidence regarding Boyde's character and background.

III

Under any standard, though, the instructions are inadequate to ensure that the jury considered *all* mitigating evidence. The majority's conclusion that factor (k) would be understood by reasonable jurors to permit consideration of mitigating factors unrelated to the crime does not accord with the plain meaning of the factor's language.[4] A "circumstance which extenuates the gravity of the crime" unambiguously refers to circumstances *related to the crime.* Jurors, relying on ordinary language and experience, would not view the seriousness of a crime as dependent upon the background or character of the offender. A typical juror would not, for example, describe a particular murder as "a less serious crime" because of the redeeming qualities of the murderer; surely Boyde's murder of Gibson could not be considered less grave, as the majority suggests, because Boyde demonstrated that his "criminal conduct was an aberration from otherwise good character," *ante*, at 382–383, n. 5.[5] Rather, an offender's background and character unrelated to his crime should be considered by the sentencer because of society's deeply felt view that punishment should reflect *both* the seriousness of a crime *and* the nature of the offender. See, *e. g.*, *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) (a sentence should "'reflect a reasoned *moral* response to the defendant's

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[4] As the majority concedes, see *ante*, at 374, n. 2, several years after Boyde's trial, the California Supreme Court recognized the "potential misunderstanding" generated by the instructions challenged in his case and thereafter required lower courts to supplement the unadorned factor (k) instruction with language that would explicitly inform the jury that it could

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consider any "'aspect of [the] defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death.'" *People* v. *Easley*, 34 Cal. 3d 858, 878, n. 10, 671 P. 2d 813, 826, n. 10 (1983) (quoting *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978)).

[5] Thus, it is unsurprising that a criminal treatise, in describing the evolution of offense classification in our criminal system, reports that "serious offenses" such as murder, manslaughter, rape, and arson came to be called felonies, whereas other, presumably "less serious" offenses, came to be called misdemeanors. 1 C. Torcia, Wharton's Criminal Law § 17, p. 81 (14th ed. 1978); see also *Argersinger* v. *Hamlin*, 407 U. S. 25, 34 (1972) ("[E]ven in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer"). The characterization of felonies, which are defined by certain offense-related elements, as serious crimes *regardless of the nature of the offender* captures our intuitive sense that a crime is not made less serious by factors extrinsic to it, but *only* by circumstances surrounding the offense itself. For similar reasons, the doctrine of justification and excuse in our criminal law focuses solely on factors related to the commission of the crime, such as duress, necessity, entrapment, and ignorance or mistake. See, *e. g.*, 1 W. LaFave & A. Scott, Substantive Criminal Law, Ch. 5 (1986).

background, character, and crime'" (quoting *California* v. *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring)).

A

The majority resists the natural understanding of the instruction by focusing on language in *Penry* that describes "'the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*'" *Ante*, at 382 (quoting *Penry*, *supra*, at 319) (emphasis added by majority). According to the majority, this statement reveals that jurors could understand background and character evidence as extenuating the seriousness of a crime. But this language does not prove what the majority would have it prove. The language tells us, as is clear from several of our cases, that a criminal defendant may be considered *less culpable* and thus less deserving of severe punishment if he encountered unusual difficulties in his background, suffers from limited intellectual or emotional resources, or possesses redeeming qualities. See, *e. g.*, *Woodson*, 428 U. S., at 304 (plurality opinion). The language in *Penry* does not, however, suggest that because an offender's culpability is lessened his crime, too, is less serious. Rather than answering the central question of this case—whether character and background evidence can be regarded as "extenuat[ing] the gravity of the crime" as opposed to lessening the offender's moral culpability—*Penry* simply confirms that an offender's background and character, apart from his crime, must be considered in fixing punishment.[6]

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[6] To the extent it has spoken to the issue, this Court supports the view that circumstances that extenuate the gravity of a crime are analytically distinct from evidence regarding an offender's character and background. The commitment to considering background and character evidence in our capital punishment jurisprudence is traceable, in part, through *Woodson*, to the following passage in *Pennsylvania ex rel. Sullivan* v. *Ashe*, 302 U. S. 51, 54–55 (1937) (emphasis added): "[P]unishment of like crimes may

The majority appears to rest its position on the assumption that it would be nonsensical, given society's "long held" belief that character and background evidence is relevant to a sentencing determination, to conclude that the jury might have thought that it could not consider such evidence. *Ante*, at 381–382. If the value of giving effect to such mitigating evidence is so deeply held, the assumption holds, surely the jury could not have been misled by the trial court's instructions. The sad irony of the majority's position is that, under its reasoning, the more fundamentally rooted a legal principle is in our constitutional values, the less scrutiny we would apply to jury instructions that run counter to that principle. For example, because "the presumption of innocence [is] that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law,'" *In re Winship*, 397 U. S. 358, 363 (1970) (quoting *Coffin* v. *United States*, 156 U. S. 432, 453 (1895)), the majority apparently would resolve doubts about the adequacy of a reasonable-doubt instruction against the accused on the assumption that jurors share our "long held" belief in the presumption of innocence. The majority's position would therefore encourage trial courts to be exacting in their instructions regarding legal minutiae but leave in barest form instructions regarding those principles "indispensable to command the respect and confidence of the community in applications of the criminal law." 397 U. S., at 364. Because this argument inverts the degree of concern we should exhibit toward fundamental errors in criminal proceedings, it is unacceptable.

B

As the majority maintains, the adequacy of an instruction must be judged "'in the context of the overall charge.'"

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be made more severe if committed by ex-convicts. . . . For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense *together with* the character and propensities of the offender."

Ante, at 378 (citations omitted). Nothing in the charge here, however, overcame the constitutional inadequacy of factor (k) in failing to instruct the jury to consider all mitigating evidence.

The majority suggests that factor (k), by referring to "'[a]ny *other* circumstance which extenuates the gravity of the crime'" (emphasis added), signaled that character and background evidence could be considered because "[o]ther factors listed in CALJIC 8.84.1 allow for consideration of mitigating evidence not associated with the crime itself." *Ante*, at 378, 383. The majority thus believes that the jury would be unlikely to read a limitation into factor (k) that was not shared by all of the "other" factors to which the prefatory language in factor (k) refers. But the "any other" language in factor (k) need not refer to *all* of the preceding factors; it could well refer *solely* to those factors that permit consideration of mitigating evidence related to the offense.[7] The understanding of the instruction must turn on the meaning of "circumstance which extenuates the gravity of the crime," not on factor (k)'s prefatory language. Because that phrase unambiguously refers to circumstances related to the crime, one cannot reasonably conclude on the basis of the scope of the other factors that the jury understood factor (k) to encompass mitigating evidence regarding Boyde's character and background.

Equally unpersuasive is the majority's claim that Boyde's presentation of extensive background and character evidence itself suggests that the jurors were aware of their responsibility to consider and give effect to that evidence. This argument is foreclosed by *Penry*, where we stated that "it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." 492 U. S., at 319. Thus, mere presentation of mitigating evidence, in the absence of a mechanism for giving effect to such evidence, does not satisfy constitutional requirements.

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[7] Indeed, at least seven of the ten factors preceding factor (k)—factors (a), (d), (e), (f), (g), (h), and (j)—relate solely to circumstances surrounding the commission of the offense. See *ante*, at 373–374, n. 1 (quoting complete instruction).

The majority attempts to avoid this conclusion by characterizing this case as unlike those in which the instructions "clearly directed the sentencer to disregard evidence." *Ante*, at 384. Implicit in this claim is the view that the Constitution is satisfied when the sentencing instructions do not explicitly preclude the jury from considering all mitigating evidence. In other words, the Constitution provides no *affirmative* guarantee that the jury will be informed of its proper sentencing role. This view is unsupportable.

The Court in *Lockett*, faced with statutory restrictions on the consideration of mitigating evidence, framed the relevant question in that case to be whether the instructions "prevent[ed] the sentencer . . . from giving independent mitigating weight to aspects of the defendant's character." 438 U. S., at 605. We have understood this principle affirmatively to require the sentencing court to alert the jury to its constitutional role in capital sentencing. Thus, in *Penry*, we overturned a death sentence because the jury was not informed that it could consider mitigating evidence regarding Penry's mental retardation and childhood abuse. It was "the *absence* of instructions informing the jury that it could consider and give effect to the mitigating evidence" that was dispositive. 492 U. S., at 328 (emphasis added); see also *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring) ("[T]he jury instructions—taken as a whole—*must clearly inform* the jury that they are to consider any relevant mitigating evidence about a defendant's background and character" (emphasis added)); cf. *Sumner* v. *Shuman*, 483 U. S. 66, 76 (1987) ("Not only [does] the Eighth Amendment require that capital-sentencing schemes permit the defendant to present any relevant mitigating evidence, but '*Lockett* requires the sentencer to listen' to that evidence") (quoting *Eddings* v. *Oklahoma*, 455 U. S. 104, 115, n. 10 (1982)). The Court cannot fairly conclude, then, that the mere presentation of evidence satisfied Boyde's right to a constitutionally adequate sentencing determination.

Finally, in examining the context of the sentencing instructions, the majority finds "no objectionable prosecutorial argument" that would reinforce an impermissible interpretation of factor (k). Although the prosecutor "'never suggested that the background and character evidence could not be considered,'" *ante*, at 385 (quoting 46 Cal. 3d 212, 251, 758 P. 2d 25, 47 (1988)), he did not need to. Factor (k) accomplished that purpose on its own, and the prosecutor, to make his point, needed only to repeat that language to the jury.

In his opening penalty phase argument to the jury, the prosecutor described some of the background and character evidence that Boyde had offered and asked rhetorically: "[D]oes this in any way relieve him or . . . in any way suggest that this crime is less serious or that the gravity of the crime is any less; I don't think so." App. 24. The majority suggests that this argument merely went to the *weight* the jury should assign to Boyde's character and background evidence. *Ante*, at 385–386. But the argument directly tracks the language of factor (k) specifying what evidence may be considered, not what weight should be attached to such evidence. The argument does not suggest that Boyde's background and character evidence was untrue or insubstantial, but rather emphasizes that the evidence did not, indeed could not *in any way*, lessen the seriousness or the gravity of the crime itself.

The prosecutor's closing statement likewise reinforced the message that evidence unrelated to the crime did not fall within the scope of factor (k): "If you look and you read what it says about extenuation, it says, 'To lessen the seriousness of a crime as by giving an excuse.' Nothing I have heard lessens the seriousness of this crime." App. 29. Again, the prosecutor designed his argument to bring home to the jury the plain meaning of the sentencing instructions. That the argument focuses more on the language of factor (k) than on the substance of Boyde's mitigating evidence confirms that the prosecutor sought to prevent the jury from considering non-crime-related evidence.

Nor is this a case in which potentially misleading prosecutorial argument can be discounted because the trial court's instructions satisfactorily informed the jury of its proper sentencing role. Rather, the prosecutor exploited the constitutional inadequacy of factor (k) and sought to ensure that the limited scope of factor (k) did not escape the attention of the jury. Thus, *both* the prosecutor's comments and the trial court's charge failed to communicate to the jury that it could give effect to mitigating character and background evidence. At the very least, a reasonable juror *could* have understood the charge and the prosecutor's arguments as so limited. Accordingly, neither the words of the charge nor the context in which they were given provide sufficient assurance that the jury considered all mitigating evidence.

IV

"When the State brings a criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" *Santosky* v. *Kramer*, 455 U. S. 745, 755 (1982) (quoting *Addington* v. *Texas*, 441 U. S. 418, 423 (1979)). I cannot conclude with any confidence that Boyde's jury understood that it could consider, as mitigating factors, evidence of Boyde's difficult background and limited personal resources.[8] That the majority regards confidence in such a conclusion as unnecessary to its affirmance of Boyde's death sentence reflects the Court's growing and unjustified hostility to claims of constitutional violation by capital defendants. When we tolerate the possibility of error in capital proceedings, and "leav[e] people in doubt," *In re Winship*, 397 U. S., at 364, whether defendants undeserving of that fate are put to their death, we hasten our return to the discriminatory, wanton, and freakish administration of the death penalty that we found intolerable in *Furman* v. *Georgia*, 408 U. S. 238 (1972).

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[8] For the reasons canvassed in JUSTICE BRENNAN's dissent in *Blystone* v. *Pennsylvania*, *ante*, p. 299, I also believe that the mandatory language of California's sentencing scheme deprives a capital defendant of an independent judgment by the sentencer that death is the appropriate punishment. Like the instruction in *Blystone*, Boyde's instruction required the

V

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S., at 231–241 (MARSHALL, J., dissenting), I would in any case vacate the decision below affirming Boyde's death sentence.

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sentencer to deliver a verdict of death if the aggravating circumstance or circumstances, no matter how insubstantial, outweighed the mitigating circumstances. Channeling sentencing discretion is indeed an essential aspect of a constitutional capital punishment scheme, but it should not be understood to deprive the sentencer of the choice to reject the ultimate sanction where the aggravating circumstances do not warrant it.

BUTLER *v.* McKELLAR, WARDEN, ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–6677. Argued October 30, 1989—Decided March 5, 1990

Six weeks after Pamela Lane was murdered, petitioner Butler was arrested on an unrelated assault charge for which he retained counsel. While in custody, Butler was informed that he was a suspect in Lane's murder. After receiving *Miranda* warnings, he signed waiver of rights forms and made incriminating statements about the Lane murder during interrogation. At his capital murder trial, the court denied his motion to suppress these statements, and he was convicted and sentenced to death. After his conviction became final on direct appeal, he filed a petition for federal habeas relief, which was dismissed by the District Court. The Court of Appeals affirmed, rejecting his argument that *Edwards* v. *Arizona*, 451 U. S. 477, requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel on any offense. Subsequently, this Court handed down *Arizona* v. *Roberson*, 486 U. S. 675, which held that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. The Court of Appeals denied Butler's request for rehearing. It reasoned that he was not entitled to the retroactive benefit of *Roberson*. According to the court, the *Edwards-Roberson* limitations on police interrogation are only tangentially related to the truth-finding function. It viewed those limitations as part of the prophylactic protection of the Fifth Amendment right to counsel created to be "guidelines" for the law enforcement profession and held that Butler's interrogation, while contrary to present "guidelines," had been conducted in strict accordance with established law at the time.

Held:

1. *Roberson* announced a "new rule," since its result was not dictated by a precedent existing at the time the defendant's conviction became final, and is therefore inapplicable to cases on collateral review under *Teague* v. *Lane*, 489 U. S. 288, and *Penry* v. *Lynaugh*, 492 U. S. 302. The fact that a majority of this Court said that Roberson's case was directly controlled by *Edwards* is not conclusive for purposes of deciding whether *Roberson* established a new rule under *Teague*. Courts frequently view their decisions as "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. It would not have been an illogical or even a grudging

application of *Edwards* to decide that it did not extend to *Roberson*'s facts, since—as evidenced by the significant difference of opinion on the part of several lower courts that had considered the question previously—*Roberson*'s outcome was susceptible to debate among reasonable minds. Pp. 412–415.

2. *Roberson*'s rule does not come within either of the exceptions under which a new rule is available on collateral review. The first exception—for a rule that places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe—is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is not prohibited by the *Roberson* rule, and *Roberson* did not address any categorical guarantees accorded by the Constitution, see *Penry*, *supra*, at 329. Nor did *Roberson* establish any principle that would come within the second exception. The scope of that exception—for a rule that requires the observance of those procedures that are implicit in the concept of ordered liberty—is limited to those new procedures without which the likelihood of an accurate conviction is seriously diminished. However, a violation of *Roberson*'s added restrictions on police investigatory procedures may instead increase the likelihood of obtaining an accurate determination. Pp. 415–416.

846 F. 2d 255, affirmed.

REHNQUIST, C. J., delivered the opinion of the Court, in which WHITE, O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in Parts I, II, and III of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 417.

John H. Blume, by appointment of the Court, 490 U. S. 1079, argued the cause for petitioner. With him on the briefs were *David I. Bruck* and *Dale T. Cobb, Jr.*

Donald J. Zelenka, Chief Deputy Attorney General of South Carolina, argued the cause for respondents. With him on the brief was *T. Travis Medlock*, Attorney General, *pro se*.

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioner Horace Butler was convicted and sentenced to death for the murder of Pamela Lane. After his conviction became final on direct appeal, Butler collaterally attacked his conviction by way of a petition for federal habeas corpus. Butler relied on our decision in *Arizona* v. *Roberson*, 486

U. S. 675 (1988), decided after his conviction became final on direct appeal. We have held, however, that a new decision generally is not applicable in cases on collateral review unless the decision was dictated by precedent existing at the time the petitioner's conviction became final. *Penry* v. *Lynaugh*, 492 U. S. 302 (1989); *Teague* v. *Lane*, 489 U. S. 288 (1989). We hold that our ruling in *Roberson* was not so dictated and that Butler's claim is not within either of two narrow exceptions to the general rule.

Pamela Lane, a clerk at a convenience store near Charleston, South Carolina, was last seen alive when she left work riding a moped late in the evening of July 17, 1980. The next day several fishermen discovered Lane's body near a bridge, and the following day a local minister found Lane's moped submerged in a pond behind his church.

Petitioner Butler was arrested six weeks later on an unrelated assault and battery charge and placed in the Charleston County Jail. After invoking his Fifth Amendment right to counsel, Butler retained counsel who appeared with him at a bond hearing on August 31, 1980. He was unable to make bond, however, and was returned to the county jail. Butler's attorney would later contend in state collateral relief proceedings that after the bond hearing, he had told the police officers not to question Butler further. The officers testified that they remembered no such instruction.

Early in the morning of September 1, 1980, Butler was taken from the jail to the Charleston County Police station. He was then informed for the first time that he was a suspect in Lane's murder. After receiving *Miranda* warnings, see *Miranda* v. *Arizona*, 384 U. S. 436 (1966), Butler indicated that he understood his rights and signed two "waiver of rights" forms. The police then interrogated Butler about the murder. Butler did not request his attorney's presence at any time during the interrogation.

Butler offered two explanations for Lane's death. First, he claimed that a friend, one White, killed Lane and then sought Butler's help in disposing of the moped. When his interrogators evidenced skepticism over this statement, Butler tried again. He said that he had come upon Lane in his car and had motioned her over to the side of the road. She then voluntarily accompanied him in a drive to a nearby wooded area where the two engaged in consensual sex. Afterwards Lane threatened to accuse Butler of rape when she realized she would be late getting home. Butler maintained that he panicked, shot Lane with a handgun, and dumped her body off a bridge. In this version of the story, Butler asserted that White helped him dispose of the moped. Butler later took the police to the locations of the various events culminating in Lane's death.

The State indicted Butler and brought him to trial on a charge of first-degree murder. The trial court denied Butler's motion to suppress the statements given to police, and the statements were introduced into evidence. The jury found Butler guilty and, in a separate proceeding, sentenced him to death concluding that he committed the murder during the commission of a rape. The Supreme Court of South Carolina upheld Butler's conviction on direct appeal, *State* v. *Butler*, 277 S. C. 452, 290 S. E. 2d 1, and we denied certiorari. *Butler* v. *South Carolina*, 459 U. S. 932 (1982). Subsequently, Butler unsuccessfully petitioned for collateral relief in the State's courts, see *Butler* v. *State*, 286 S. C. 441, 334 S. E. 2d 813 (1985), and we again denied certiorari. *Butler* v. *South Carolina*, 474 U. S. 1094 (1986).

In May 1986, Butler filed this petition for federal habeas relief pursuant to 28 U. S. C. §2254. As characterized by the District Court, one question raised in the petition was "whether police had the right to initiate questioning about the murder knowing petitioner had retained an attorney for the assault charge." App. 119. The District Court dismissed the petition on respondents' motion for summary judgment.

On appeal to the United States Court of Appeals for the Fourth Circuit, see *Butler* v. *Aiken*, 846 F. 2d 255 (1988), Butler argued that *Edwards* v. *Arizona*, 451 U. S. 477 (1981), requires the police, during continuous custody, to refrain from all further questioning once an accused invokes his right to counsel on any offense. In support of his argument, Butler relied principally on *United States ex rel. Espinoza* v. *Fairman*, 813 F. 2d 117 (CA7 1987). The Court of Appeals rejected Butler's *Espinoza*-based contention, finding the Seventh Circuit's ruling an unpersuasive and "dramatic" extension of *Edwards*. *Butler*, 846 F. 2d, at 258.

The court concluded that Butler's statements were preceded by appropriate warnings and a voluntary waiver of Fifth Amendment protections. The statements, therefore, were not obtained in violation of his constitutional rights or *Edwards'* prophylactic rule. According to the court, a properly initiated interrogation on an entirely different charge does not intrude into an accused's previously invoked rights but instead offers the accused an opportunity to weigh his rights intelligently in light of changed circumstances. When, as occurred in this case, the accused then freely waives any constitutional right to counsel and provides voluntary statements of an incriminating nature, there is no justification for undermining the search for the truth by suppressing those statements. *Butler*, 846 F. 2d, at 259. The Court of Appeals affirmed the dismissal of Butler's petition, and approximately one month later, denied Butler's request for rehearing and suggestion for rehearing en banc.

On the same day the court denied Butler's rehearing petitions, we handed down our decision in *Roberson*. We held in *Roberson* that the Fifth Amendment bars police-initiated interrogation following a suspect's request for counsel in the context of a separate investigation. 486 U. S., at 682. On Butler's motion for reconsideration, the original Fourth Circuit panel considered Butler's new contention that *Roberson* requires suppression of his statements taken in the separate investigation of Lane's murder. Although the panel conceded that the substance of its prior conclusion "was cast into immediate and serious doubt" by our subsequent decision in *Roberson*, *Butler* v. *Aiken*, 864 F. 2d 24, 25 (1988), it nevertheless determined that Butler was not entitled to the retroactive benefit of *Roberson.* According to the panel, the *Edwards-Roberson* limitations on police interrogation are only tangentially related to the truth-finding function. 864 F. 2d, at 25. They are viewed most accurately as part of the prophylactic protection of the Fifth Amendment right to counsel created to be "guidelines" for the law enforcement profession. *Ibid.* (citing *Roberson*, *supra*, at 680–682). The interrogation of Butler, while unquestionably contrary to present "guidelines," was conducted in strict accordance with established law at the time. The panel, therefore, denied Butler's petition for rehearing. A majority of the Circuit Judges denied, over a dissent, Butler's petition for a rehearing en banc. We granted certiorari, 490 U. S. 1045 (1989), and now affirm.

Last Term in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), we held that in both capital and noncapital cases, "new rules will not be applied or announced in cases on collateral review unless they fall into one of two exceptions." *Id.*, at 313 (citing *Teague* v. *Lane*, 489 U. S., at 311–313; see *infra*, at 415–416 (discussing the exceptions and their inapplicability to the instant case). Referring to *Teague*, we reiterated that, in general, a case announces a "new rule" when it breaks new ground or imposes a new obligation on the States or the Federal Government. *Penry*, 492 U. S., at 314. Put differently, and, indeed, more meaningfully for the majority of cases, a decision announces a new rule "'if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.'" *Ibid.* (quoting *Teague*, *supra*, at 301) (emphasis in original).

A new decision that explicitly overrules an earlier holding obviously "breaks new ground" or "imposes a new obligation." In the vast majority of cases, however, where the new decision is reached by an extension of the reasoning of previous cases, the inquiry will be more difficult. We said in *Teague:*

> "'The relevant frame of reference . . . is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.' *Mackey*[v. *United States*, 401 U. S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)]. . . . 'The interest in leaving concluded litigation in a state of repose . . . may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.' . . . Given the 'broad scope of constitutional issues cognizable on habeas,' . . . it is 'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [habeas] cases on the basis of intervening changes in constitutional interpretation.' . . . '[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this *deterrence* function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.'" *Teague*, *supra*, at 306 (plurality opinion) (emphasis added; some brackets in original; some internal citations omitted).

Teague further observed:

> "[I]n many ways the application of new rules to cases on collateral review may be more intrusive than the enjoining of [state] criminal prosecutions . . . for it *continually* forces the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to

> then-existing constitutional standards. Furthermore, as we recognized in *Engle* v. *Isaac*,[456 U. S. 107, 128, n. 33 (1982),] '[s]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands.' . . . See also *Brown* v. *Allen*, 344 U. S.[443], 534 [(1953)] (Jackson, J., concurring in result) (state courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them')." *Teague*, *supra*, at 310 (plurality opinion) (emphasis in original; some internal citations omitted).

The "new rule" principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions. Cf. *United States* v. *Leon*, 468 U. S. 897, 918–919 (1984) (assuming the exclusionary rule "effectively deters some police misconduct and provides incentives for the law enforcement profession as a whole to conduct itself in accord with the Fourth Amendment, it cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity").

Butler contends that *Roberson* did not establish a new rule and is, therefore, available to support his habeas petition. Butler argues that *Roberson* was merely an application of *Edwards* to a slightly different set of facts. Brief for Petitioner 9; Reply Brief for Petitioner 18. In support of his position, Butler points out that the majority had said that Roberson's case was directly controlled by *Edwards*. Brief for Petitioner 10. At oral argument Butler's counsel also pointed out that the *Roberson* opinion had rejected Arizona's request to create an "exception" to *Edwards* for interrogations concerning separate investigations. Tr. of Oral Arg. 4. According to counsel, the opinion in *Roberson* showed that the Court believed Roberson's case to be within the "logical compass" of *Edwards*. Tr. of Oral Arg. *passim*.

But the fact that a court says that its decision is within the "logical compass" of an earlier decision, or indeed that it is "controlled" by a prior decision, is not conclusive for purposes of deciding whether the current decision is a "new rule" under *Teague*. Courts frequently view their decisions as being "controlled" or "governed" by prior opinions even when aware of reasonable contrary conclusions reached by other courts. In *Roberson*, for instance, the Court found *Edwards* controlling but acknowledged a significant difference of opinion on the part of several lower courts that had considered the question previously. 486 U. S., at 679, n. 3. That the outcome in *Roberson* was susceptible to debate among reasonable minds is evidenced further by the differing positions taken by the judges of the Courts of Appeals for the Fourth and Seventh Circuits noted previously. It would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson*. We hold, therefore, that *Roberson* announced a "new rule."

The question remains whether the new rule in *Roberson* nevertheless comes within one of the two recognized exceptions under which a new rule is available on collateral review. Under the first exception, "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'" *Teague*, 489 U. S., at 307 (plurality opinion) (quoting *Mackey*, 401 U. S. 667, 692 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). This exception is clearly inapplicable. The proscribed conduct in the instant case is capital murder, the prosecution of which is, to put it mildly, not prohibited by the rule in *Roberson*. Nor did *Roberson* address any "categorical guarantees accorded by the Constitution" such as a prohibition on the imposition of a particular punishment on a certain class of offenders. See *Penry*, 492 U. S., at 329.

Under the second exception, a new rule may be applied on collateral review "if it requires the observance of 'those procedures that . . . are "implicit in the concept of ordered liberty."'" *Teague, supra,* at 311 (plurality opinion) (quoting *Mackey, supra,* at 693 (Harlan, J., concurring in judgments in part and dissenting in part) (in turn quoting *Palko* v. *Connecticut,* 302 U. S. 319, 325 (1937) (Cardozo, J.))). *Teague,* it should be noted, however, discerned a latent danger in relying solely on this famous language from *Palko:*

> "Were we to employ the *Palko* test without more, we would be doing little more than importing into a very different context the terms of the debate over incorporation. . . . Reviving the *Palko* test now, in this area of law, would be unnecessarily anachronistic. . . . [W]e believe that Justice Harlan's concerns about the difficulty in identifying both the existence and the value of accuracy-enhancing procedural rules can be addressed by limiting the scope of the second exception to those new procedures without which the likelihood of an accurate conviction is seriously diminished.
>
> "Because we operate from the premise that such procedures would be so central to an accurate determination of innocence or guilt, we believe it unlikely that many such components of basic due process have yet to emerge." *Teague, supra,* at 312–313 (plurality opinion).

Because a violation of *Roberson*'s added restrictions on police investigatory procedures would not seriously diminish the likelihood of obtaining an accurate determination—indeed, it may increase that likelihood—we conclude that *Roberson* did not establish any principle that would come within the second exception.

The judgment of the Court of Appeals is therefore

Affirmed.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join as to Parts I, II, and III, dissenting.

Last Term in *Teague* v. *Lane*, 489 U. S. 288 (1989), this Court manifested its growing hostility toward Congress' decision to authorize federal collateral review of state criminal convictions,[1] curtailing the writ of habeas corpus by dramatically restructuring retroactivity doctrine. The plurality declared that a federal court entertaining a state prisoner's habeas petition generally may not reach the merits of the legal claim unless the court determines, as a threshold matter, that a favorable ruling on the claim would flow from the application of legal standards "'prevailing at the time [the petitioner's] conviction became final.'" *Id.*, at 306 (quoting *Mackey* v. *United States*, 401 U. S. 667, 689 (1971) (Harlan, J., concurring in judgment in part and dissenting in part)). Thus, with two narrow exceptions, *Teague*, *supra*, at 307, 311–313, "new" rules of law provide no basis for habeas relief. The plurality stated that a ruling qualifies as "new" "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U. S., at 301 (emphasis in original).

Today, under the guise of fine-tuning the definition of "new rule," the Court strips state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration. A legal ruling sought by a federal habeas petitioner is now deemed "new" as long as the correctness of the rule, based on precedent existing when the petitioner's conviction became final, is "susceptible to debate among reasonable minds." *Ante*, at 415. Put another way, a state prisoner can secure habeas relief only by showing that the state court's rejection of the constitutional challenge was *so* clearly invalid under then-prevailing legal standards that the decision could not be defended by any reasonable jurist. With this requirement, the Court has finally succeeded in its thinly veiled crusade to eviscerate Congress' habeas corpus regime.

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[1] Title 28 U. S. C. § 2254(a) provides that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

I

Because constitutional interpretation is an evolutionary process, the analytical distinction between legal rules "prevailing" at the time of conviction and "new" legal rules is far from sharp. This distinction must be drawn carefully, with reference to the nature of adjudication in general and the purposes served by habeas corpus in particular. But while the Court purports to draw guidance from the retroactivity analysis advanced by Justice Harlan, see *ante*, at 413 (quoting *Teague*, *supra*), the Court simply ignores Justice Harlan's admonition that "[t]he theory that the habeas petitioner is entitled to the law prevailing at the time of his conviction is . . . more complex than the Court has seemingly recognized." *Desist* v. *United States*, 394 U. S. 244, 263 (1969) (Harlan, J., dissenting). Instead, the Court embraces a virtually all-encompassing definition of "new rule" without pausing to articulate any justification therefor. Result, not reason, propels the Court today.

A

The Court's preclusion of federal habeas review for all but the most indefensible state-court rejections of constitutional challenges is made manifest by the Court's conclusion that our recent holding in *Arizona* v. *Roberson*, 486 U. S. 675 (1988), qualifies as establishing a "new rule." Long before *Roberson*, this Court recognized the presumptively coercive nature of custodial interrogations and held that an interrogation must cease if and when a suspect requests an attorney. "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests upon the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Miranda* v. *Arizona*, 384 U. S. 436, 475 (1966). In *Edwards* v. *Arizona*, 451 U. S. 477 (1981), we applied this rule to a situation where detectives renewed an interrogation of the accused about a series of offenses, after he had requested counsel during an earlier interrogation concerning the same offenses. We "reconfirm[ed] these views [expressed in *Miranda*, *supra*] and, to lend them substance, emphasize[d] that it is inconsistent with *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U. S., at 485. We carefully considered the circumstances under which a suspect, who has requested counsel during a custodial interrogation, may be deemed to have validly waived his right to counsel prior to the resumption of interrogation. We concluded that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated interrogation even if he has been advised of his rights." *Id.*, at 484. As a result, we established a bright-line rule: a suspect who has "expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." *Id.*, at 484–485.

In *Roberson*, *supra*, the State of Arizona "ask[ed] us to craft an exception to that rule." 486 U. S., at 677. Noting that *Edwards* involved two interrogations concerning the same offenses, the State of Arizona sought an exception "for cases in which the police want to interrogate a suspect about an offense that is unrelated to the subject of their initial interrogation." 486 U. S., at 677. We declined, finding "unavailing" the State's "attempts at distinguishing the factual setting here from that in *Edwards*." *Id.*, at 685. We explained that the rule articulated in *Edwards* reflected our concern that "if a suspect believes that he is not capable of undergoing [custodial] questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." 486 U. S., at 681. That Roberson's second interrogation concerned a different subject than his first in no way assuaged our concern that Roberson's initial request for counsel reflected an inability to deal with police questioning without legal advice. Therefore *Edwards*' application did not turn on the subject matter of the two interrogations. 486 U. S., at 682; see *id.*, at 684 ("[T]here is no reason to assume that a suspect's state of mind is in any way investigation-specific"). We likewise "attach[ed] no significance to the fact that the officer who conducted the second interrogation did not know that [Roberson] had made a request for counsel," because "*Edwards* focuses on the state of mind of the suspect and not of the police." *Id.*, at 687.

B

It is clear from our opinion in *Roberson* that we would have reached the identical conclusion had that case reached us in 1983 when Butler's conviction became final. In *Roberson*, we simply applied the legal principle established in *Miranda* and reconfirmed in *Edwards* to a set of facts that was not dissimilar in any salient way. We did not articulate any *new* principles of Fifth Amendment jurisprudence that were not already established in 1983.

Yet today the Court classifies *Roberson* as a "new rule" *notwithstanding* the above, characterizing the "outcome in *Roberson* [as] susceptible to debate among reasonable minds." *Ante*, at 415. For this conclusion, the majority appears to rely solely on the fact that the court below and several state courts had incorrectly predicted the outcome in *Roberson* by holding that the *Edwards* rule ought not apply where the second interrogation involves different subject matter. *Ibid.* But this reliance is perplexing. The majority might mean to suggest that a particular result is reasonable so long as a certain number of courts reach the same result. But this would be an odd criterion for "reasonableness." Its application would be ad hoc, both because there appears to be no principled basis for choosing any particular number of courts whose agreement is required before the result is deemed "reasonable," and because the criterion ultimately rests on a bootstrap to the extent that the later courts reaching the result simply rely on the earlier courts' having done the same.

On the other hand, the majority might mean that the lower court decisions foreshadowing the dissent's position in *Roberson,* though ultimately erroneous, were nevertheless "reasonable" according to some objective criterion of adjudication.[2] But the Court does not purport to identify any such criterion or explain its application in this case. Instead, the Court announces in peremptory fashion that "[i]t would not have been an illogical or even a grudging application of *Edwards* to decide that it did not extend to the facts of *Roberson.*" *Ante,* at 415. This characterization is mystifying, given our explanation in *Roberson* that the result was clearly dictated by *Edwards.* See *supra,* at 419–420.

The only conclusion discernible from the majority's discussion is that the majority would label "new" any rule of law favoring a state prisoner that can be distinguished from prior precedent on any conceivable basis, legal or factual.[3] The converse of this conclusion is that, in the majority's view, adjudication according to "prevailing" law must consist solely of applying binding precedents to factual disputes that cannot be distinguished from prior cases in any imaginable way. Because after *Teague* v. *Lane*, 489 U. S. 288 (1989), a federal court may entertain a habeas petition on the merits only if the petitioner seeks application of "prevailing" law as so narrowly defined, the majority today limits federal courts' habeas corpus function to reviewing state courts' legal analysis under the equivalent of a "clearly erroneous" standard of review. A federal court may no longer consider the merits of the petitioner's claim based on its best interpretation and application of the law prevailing at the time her conviction became final; rather, it must defer to the state court's decision rejecting the claim unless that decision is patently unreasonable.[4]

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[2] If according to such a criterion these decisions were unreasonable at the time they were issued, then of course no matter how many such decisions were issued, they provide no evidence for the proposition that "reasonable minds" could reach different results about the application of *Edwards* v. *Arizona,* 451 U. S. 477 (1981), to the fact pattern in *Arizona* v. *Roberson,* 486 U. S. 675 (1988). From this perspective, 10 egregiously wrong decisions can be no more reasonable than 1.

[3] Indeed, elsewhere the Court practically trips over itself in evident haste to employ the broadest possible definition of a "new rule." See

II

The Court's exceedingly broad definition of "new rule"—and conversely its narrow definition of "prevailing" law—betrays a vision of adjudication fundamentally at odds with any this Court has previously recognized. According to Justice Harlan, whose retroactivity jurisprudence undergirds

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Saffle v. *Parks*, *post*, at 491 (habeas petitioner's legal claim proposes "new rule" when existing precedents favorably "inform, or even control or govern," the claim but do not "compel the rule that [petitioner] seeks").

[4] This limitation of the federal courts' function creates a systemic bias within the habeas system in favor of narrow interpretations of criminal procedure protections. Habeas petitioners may no longer benefit from legal rulings that expand required procedural protections. But under the Court's regime, habeas petitioners who have valid claims under "prevailing" law even as defined today may nevertheless *lose* their claims should a federal court on habeas review decide to issue a "new" rule of law in favor of the *State* (indeed, with increasing frequency, States attempt to defend decisions denying federal habeas relief on the ground that the existing Supreme Court precedent upon which the petitioner purports to rely should be overruled or modified). Today's decisions in *Butler* and *Saffle*, foreclosing relief for two petitioners based on "new" understandings of the limits of federal habeas, starkly illustrate the Court's lack of concern for symmetry—and fairness.

Teague and its progeny: "One need not be a rigid partisan of Blackstone to recognize that many, though not all, of this Court's constitutional decisions are grounded upon fundamental principles whose content does not change dramatically from year to year, but whose meanings are altered slowly and subtly as generation succeeds generation." *Desist*, 394 U. S., at 263 (Harlan, J., dissenting). As every first-year law student learns, adjudication according to prevailing law means far more than obeying precedent by perfunctorily applying holdings in previous cases to virtually *identical* fact patterns. Rather, such adjudication requires a judge to evaluate both the content of previously enunciated legal rules and the breadth of their application. A judge must thereby discern whether the principles applied to specific fact patterns in prior cases fairly extend to govern *analogous* factual patterns. In Justice Harlan's view, adjudication according to prevailing law demands that a court exhibit "conceptual faithfulness" to the principles underlying prior precedents, not just "decisional obedience" to precise holdings based upon their unique factual patterns. *Id.*, at 266, n. 5 (employing Justice Fortas' terminology). The inability of lower courts to predict significant reformulations by this Court of the principles underlying prior precedents does not excuse them from the obligation to draw reasoned conclusions from principles that are well established at the time of their decisions.

The majority suggests obliquely that adoption of a "'new rule' principle [that] validates reasonable, good-faith interpretations of existing precedents," *ante*, at 414—which in turn means that adjudication according to "prevailing" law requires only strict "decisional obedience" to existing precedents—would still serve the "*deterrence* function" animating federal habeas review. *Ibid.* (emphasis in original). But this claim begs a central question: deterrence of what? Under the definition of "prevailing" law embraced today, federal courts may not entertain habeas petitions challenging state-court rejections of constitutional claims unless those state decisions are clearly erroneous. So at best, the threat of habeas review will deter state courts only from completely indefensible rejections of federal claims. State courts essentially are told today that, save for outright "illogical" defiance of a binding precedent precisely on point, their interpretations of federal constitutional guarantees—no matter how cramped and unfaithful to the principles underlying existing precedent—will no longer be subject to oversight through the federal habeas system. State prosecutors surely will offer every conceivable basis in each case for distinguishing our prior precedents, and state courts will be free to "'disregard the plain purport of our decisions and to adopt a let's-wait-until-it's-decided [by the Supreme Court] approach.'" *United States* v. *Johnson*, 457 U. S. 537, 561 (1982) (quoting *Desist*, *supra*, at 277 (Fortas, J., dissenting)); cf. *Johnson*, *supra*, at 561 (rejecting contention that "all rulings resolving unsettled Fourth Amendment questions should be nonretroactive [to cases pending upon direct review because otherwise,] in close cases, law enforcement officials would have little incentive to err on the side of constitutional behavior").[5]

This Court has never endorsed such a cramped view of the deterrent purpose of habeas review: we have always expected the threat of habeas to encourage state courts to adjudicate federal claims "correctly," not just "reasonably." See, *e. g.*, *Teague*, *supra*, at 306–307 (deterrence rationale requires "[r]eview on habeas to determine that the conviction rests upon *correct* application of the law in effect at the time of the conviction") (emphasis added) (quoting *Solem* v. *Stumes*, 465 U. S. 638, 653 (1984) (Powell, J., concurring in judgment)). And, as explained above, "correct" adjudication has always been thought to require courts to exhibit "conceptual faithfulness" to the principles underlying our precedents and thereby to anticipate reasonably foreseeable applications of those principles. See, *e. g.*, *Johnson*, *supra*, at 549 ("When a decision of this Court merely has applied settled precedents to new and different factual situations, no real question [of retroactivity] has arisen . . . . In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way").[6]

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[5] Particularly if the Court today purports to hinge the determination of "reasonability" of a state-court decision on a head count of other lower courts resolving similar claims, see *supra*, at 420–421, the threat of habeas certainly would not deter state courts from adopting, without engaging in independent review of the merits, any previous court decisions rejecting these claims. Such follow-the-leader courts would be insulated from habeas review.

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[6] The Court's analogy between the deterrent function of federal habeas and the deterrent function of the exclusionary rule, see *ante*, at 414 (referencing *United States* v. *Leon*, 468 U. S. 897 (1984)), is unsound, for the purported analogy continues to beg the question of *what* conduct ought to be deterred. In *Leon*, the Court explained the threat of evidentiary exclusion ordinarily cannot deter a search that turns out to be illegal due to a technically invalid warrant "when an officer acting with objective good faith has obtained a search warrant from a judge or magistrate and acted within its scope." *Id.*, at 920. This is because the assigned task of the police officer is to execute the warrant, not independently to evaluate its compliance with substantive Fourth Amendment standards:

"It is the magistrate's responsibility to determine whether the officer's allegations establish probable cause and, if so, to issue a warrant comporting in form with the requirements of the Fourth Amendment. In the ordinary case, an officer cannot be expected to question the magistrate's probable-cause determination or his judgment that the form of the warrant is technically sufficient. '[O]nce the warrant issues, there is literally nothing more the policeman can do in seeking to comply with the law.'" *Id.*, at 921 (citation omitted).

Under these circumstances, the threat of evidentiary exclusion is not designed to conform police behavior to a higher standard than dutiful obedience to the court order. Such obedience is deemed "objectively reasonable law enforcement activity," *id.*, at 919, because it is precisely what we *expect* of police officers.

In contrast, as explained previously, see *supra*, at 424 and this page, state courts entertaining constitutional challenges to criminal proceedings are expected independently to evaluate these challenges in light of their best understanding of prevailing legal standards embodied in prec-

Indeed, even Justice Harlan, the chief proponent of the view that federal habeas is designed merely to deter erroneous state-court rejections of constitutional claims, believed that federal review is appropriate when a state court fails to presage reasonably foreseeable applications of established constitutional principles *beyond* the precise factual settings of prior precedent. Justice Harlan would have held state courts responsible for "appl[ying] a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law." *Desist*, 394 U. S., at 263. In the context of this case, Justice Harlan would not have held the rule in *Roberson* to be "new" today unless he could "say with . . . *assurance* that this Court would have ruled differently" (*i. e.*, in the State's favor) at the time Butler's conviction became final. 394 U. S., at 264 (emphasis added). In contrast, the majority embraces the opposite presumption; it holds *Roberson*'s rule to be "new" because it cannot say with assurance that the Court could *not* have ruled in favor of the State at that time.[7] Thus the Court's holding today is unfaithful even to the purported progenitor of its position.

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edent. Hence, selecting any reasonable legal rule without flouting directly applicable precedent cannot be described as "objectively reasonable [judicial] activity." Given the difference between the nature of police conduct at issue in *Leon* and judicial interpretation, the majority's proffered analogy is flawed. It ultimately does no more than borrow language from *Leon*, and in so doing, fails to justify the majority's decision to embrace a "reasonableness" test as the appropriate objective of state-court adjudication.

[7] Compare *Desist* v. *United States*, 394 U. S. 244, 264–265 (1969) (Harlan, J., dissenting) (even a decision by this Court to overrule one of its own precedents ought not be deemed a "new rule" unavailable for habeas petitioners whose convictions have already become final as long as the overruling has been foreshadowed in prior cases), with *Saffle*, *post*, at 488 (petitioner seeks application of "new rule" *unless* "state court considering [petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [petitioner] seeks was required by the Constitution") (emphasis added).

Most significantly, the limited scope of the deterrence promised by the Court's holding today defeats Congress' purpose in establishing the scheme of federal habeas review of state criminal proceedings. Congress established such review because it perceived a potential "inadequacy of state procedures to raise and preserve federal claims [and was] concern[ed] that state judges may be unsympathetic to federally created rights." *Kaufman* v. *United States*, 394 U. S. 217, 225–226 (1969).[8] Congress intended the "[t]hreat of habeas" *both* to "serv[e] as a necessary additional incentive for [state] trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards," *ante*, at 413 (citations omitted), *and* to provide petitioners a *remedy* for unlawful state deprivations of their liberty interests through a fresh and full review of their claims by an Article III court. As we recognized in *Fay* v. *Noia*, 372 U. S. 391, 424 (1963), "the manifest federal policy [underlying § 2254(a) is] that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for *plenary* federal judicial review" (emphasis added). See also, *e. g.*, *Kaufman*, *supra*, at 228 ("Congress has determined that the full protection of . . . constitutional rights requires the availability of a mechanism for collateral attack. The right then is not merely to a federal forum but to full and fair consideration of constitutional claims"). It has long been established, therefore, that federal habeas proceedings ought not accord any deference to the state court's constitutional ruling under collateral attack.[9] Instead, the federal court must determine for itself the proper scope of constitutional principles and their application to the particular factual circumstances. As explained by Justice Frankfurter, "[t]he congressional requirement is [that the] State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." *Brown* v. *Allen*, 344 U. S. 443, 508 (1953). Congress thus entitled petitioners to *de novo* review of their federal claims in federal habeas proceedings.[10] But the

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[8] Congress was aware that popularly elected state judges on occasion experience various political and institutional pressures, from which life-tenured federal judges are insulated, to narrow federal constitutional protections in order to advance the State's interest in law enforcement. See, *e. g.*, *Reed* v. *Ross*, 468 U. S. 1, 15 (1984) ("Although there is a remote possibility that a given state court will be the first to discover a latent constitutional issue and to order redress if the issue is properly raised, it is far more likely that the court will fail to appreciate the claim and reject it out of hand"); *Rose* v. *Mitchell*, 443 U. S. 545, 563 (1979) ("There is strong reason to believe that federal [habeas] review would indeed reveal flaws not appreciated by state judges perhaps too close to the day-to-day operation of their system to be able properly to evaluate claims that the system is defective").

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[9] Cf. *Brown* v. *Allen*, 344 U. S. 443, 458 (1953) (for purposes of habeas proceedings, the "state adjudication carries [only] the weight that federal practice gives to the conclusion of a court of last resort of another jurisdiction on federal constitutional issues").

[10] This congressional intent is further evidenced by Congress' differential treatment of state-court factual and legal determinations; the former but not the latter are accorded a presumption of correctness. In *Townsend* v. *Sain*, 372 U. S. 293 (1963), we held that, in specified circumstances, federal district courts entertaining habeas petitions must hold hearings to determine evidentiary facts relevant to the legal claims presented. In other circumstances, evidentiary hearings are discretionary, and "the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact." *Id.*, at 318. We made very clear, however, that the district judge "may not defer to [the state court's] findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas." *Ibid.*

In 1966, Congress amended the habeas statute to add § 2254(d), which "was an almost verbatim codification of the standards delineated in" *Sain*. *Miller* v. *Fenton*, 474 U. S. 104, 111 (1985). Congress elevated the Court's exhortation in *Sain* that district courts should defer to state-court factfinding after a full and fair evidentiary hearing to the status of a "mandatory presumption of correctness." *Id.*, at 111–112. But Congress reaffirmed that district courts should *not* defer to state-court conclusions of law

Court's decision today denies federal courts the role on habeas review that Congress envisioned because it limits them to remedying only clearly unreasonable state-court applications of federal law, rather than all erroneous ones.

Moreover, Congress' insistence that "federal courts have the 'last say' with respect to questions of federal law" raised during state criminal proceedings, *Kaufman*, *supra*, at 225, cannot be satisfied by this Court's jurisdiction to review state proceedings directly. State courts are well aware that the "Supreme Court's burden and responsibility are too great to permit it to review and correct every misstep made by the lower courts in the application of accepted principles. Hence the Court generally will not grant certiorari just because the decision below may be erroneous." R. Stern, E. Gressman, & S. Shapiro, Supreme Court Practice §4.17, p. 221 (6th ed. 1986).[11] We have long recognized that Congress' decision in 1867 to "exten[d] to state prisoners . . . the federal habeas corpus remedy bespoke congressional unwillingness to trust direct appellate review of state court decisions by the Supreme Court as the lone avenue of vindication of the new constitutional strictures" of the Fourteenth Amendment.

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but, rather, should make independent determinations of petitioners' legal claims based on their own best interpretations of relevant legal principles underlying existing precedent. See, *e. g.*, *id.*, at 112 ("subsidiary factual questions" surrounding confession entitled to presumption of correctness, but voluntariness of confession "is a matter for independent federal determination"). Cf. *Neil* v. *Biggers*, 409 U. S. 188, 191 (1972) (as "amended in 1966, § 2244(b) [generally proscribing successive petitions] shields against senseless repetition of claims by state prisoners without endangering the principle that each is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus").

[11] See, *e. g.*, *Watt* v. *Alaska*, 451 U. S. 259, 275 (1981) (STEVENS, J., concurring) ("Most certainly, this Court does not sit primarily to correct what we perceive to be mistakes committed by other tribunals"); *Ross* v. *Moffitt*, 417 U. S. 600, 616–617 (1974) ("This Court's [direct certiorari] review [of state-court criminal proceedings] . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review").

Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423, 426 (1961). But today's decision, essentially foreclosing habeas review as an alternative "avenue of vindication," overrides Congress' will, and leaves federal judicial protection of fundamental constitutional rights during the state criminal process solely to this Court upon direct review. I share Congress' lack of confidence in such a regime. After today, despite constitutional defects in the state processes leading to their conviction or sentencing, state prisoners will languish in jail—and others like Butler will die—because state courts were reasonable, even though wrong.[12]

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[12] The Court's decision today to limit *de novo* federal review of alleged constitutional defects in a state criminal proceeding to direct review by this Court not only thwarts Congress' intent to provide for effective federal review of such state proceedings but also threatens to retard the heretofore robust process by which constitutional principles evolve through repeated interpretation and application by both state and federal courts.

Because state courts need not fear federal habeas review so long as they avoid clearly unreasonable constructions of existing doctrine, they will have no incentive to reflect carefully about existing legal principles and thereby to develop novel and more sophisticated understandings of constitutional guarantees. In the long run, both the evolution of law and our federalist system designed to foster it will suffer. "Federalism is a device for realizing the concepts of decency and fairness which are among the fundamental principles of liberty and justice lying at the base of all our civil and political institutions. Its goals are more surely approached through an administration of federal habeas corpus which puts the state courts on the path directed to securing state prisoners against invasions of the rights guaranteed them by the basic law of the land." Brennan, Federal Habeas Corpus and State Prisoners: An Exercise in Federalism, 7 Utah L. Rev. 423, 442 (1961). See also Cover & Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L. J. 1035 (1977).

In addition, a healthy regime of federal habeas review enables this Court to await the treatment of difficult and novel legal problems by both state and federal courts before having to address such issues. Today's decision, together with *Teague* v. *Lane*, 489 U. S. 288 (1989), means that sensitive issues of criminal procedure will be litigated by lower federal courts only when adjudicating *federal* criminal prosecutions (a relatively small category of cases) and by state courts that, for reasons discussed above, are not inclined institutionally to interpret and apply federal constitutional princi-

The majority apparently finds such injustice acceptable based upon an asserted "'interest in leaving concluded litigation in a state of repose.'" *Ante*, at 413 (quoting *Teague*, 489 U. S., at 306). This will not do. It is one thing to preclude federal habeas petitioners from asserting claims based on legal principles contrary to or at least significantly dissimilar from those in existence at the time their convictions became final; such a basis for habeas relief engenders the possibility of "'*continually* forc[ing] the States to marshal resources in order to keep in prison defendants whose trials and appeals conformed to then-existing constitutional standards.'" *Ante*, at 413–414 (quoting *Teague*, *supra*, at 310). It is a *far* different thing to say that concerns for repose and resource scarcity justify today's judicial decision to protect States from the consequences of retrying or resentencing defendants whose trials and appeals *did not* conform to then-existing constitutional standards but are viewed as suffering from only "reasonable" defects. "This Court has never held . . . that finality, standing alone, provides a sufficient reason for federal courts to compromise their protection of constitutional rights under § 2254." *Reed* v. *Ross*, 468 U. S. 1, 15 (1984). Until today.

III

It is Congress and not this Court who is "'responsible for defining the scope of the writ.'" *Ante*, at 413 (citations omit-

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ples expansively. Rather than have the benefit of numerous and varied rulings on particular issues before we must address them, we likely will have the benefit of only a few state cases embracing narrow constitutional interpretations. We thus constrict "[t]he process of percolation allow[ing] a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule." Estreicher & Sexton, A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study, 59 N. Y. U. L. Rev. 681, 716 (1984). Hence, today's decision not only withdraws the personal protections properly accorded state prisoners from unconstitutional confinement, but it also disrupts our ability to structure a contemplative process of constitutional decisionmaking.

ted).[13] Yet the majority, whose Members often pride themselves on their reluctance to play an "activist" judicial role by infringing upon legislative prerogatives, does not hesitate today to dismantle Congress' extension of federal habeas to state prisoners. Hereafter, federal habeas relief will be available in only the most egregious cases, in which state courts have flouted applicable Supreme Court precedent that cannot be distinguished on any arguable basis. I must dissent from this curtailment of the writ's capacity for securing individual liberty. "For surely it is an abuse to deal too casually and too lightly with rights guaranteed by the Federal Constitution, even though they involve limitations upon State power and may be invoked by those morally unworthy. Under the guise of fashioning a procedural rule, we are not justified in wiping out the practical efficacy of a jurisdiction conferred by Congress on the District Courts." *Brown*, 344 U. S., at 498–499 (opinion of Frankfurter, J.).

IV

Even if I did not believe that petitioner is entitled in this habeas proceeding to claim the protections of the Fifth Amendment as defined by this Court in *Roberson*, I would vacate his death sentence. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976).

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[13] As noted by Justice Frankfurter:

"Congress could have left the enforcement of federal constitutional rights governing the administration of criminal justice in the States exclusively to the State courts. These tribunals are under the same duty as the federal courts to respect rights under the United States Constitution." *Brown* v. *Allen*, 344 U. S., at 499.

"[But Congress] has seen fit to give . . . to the lower federal courts power to inquire into federal claims, by way of habeas corpus. . . . [I]t would be in disregard of what Congress has expressly required to deny State prisoners access to the federal courts." *Id.*, at 508–510.

McKOY *v.* NORTH CAROLINA

CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

No. 88-5909. Argued October 10, 1989—Decided March 5, 1990

Petitioner was convicted in a North Carolina court of first-degree murder. In the trial's sentencing phase, the jury made a binding recommendation of death after finding unanimously, as required by instructions given both orally and in a written verdict form: (1) the existence of two statutory aggravating circumstances; (2) the existence of two of eight possible mitigating circumstances; (3) that the mitigating circumstances found were insufficient to outweigh the aggravating circumstances found; and (4) that the aggravating circumstances found were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances found. The State Supreme Court rejected petitioner's challenge to his sentence, distinguishing *Mills* v. *Maryland,* 486 U. S. 367. In *Mills,* this Court reversed a death sentence imposed under Maryland's capital punishment scheme because that scheme precluded a jury from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular circumstance supported by that evidence. In contrast to the Maryland procedure, which required the jury to impose a death penalty if it found at least one aggravating circumstance and no mitigating circumstances or unanimously agreed that the mitigating circumstances did not outweigh the aggravating ones, the court emphasized that Issue Four in North Carolina's scheme allowed the jury to recommend life imprisonment if it felt that the aggravating circumstances did not call for the death penalty even if it had found several aggravating circumstances and no mitigating ones. The court also reasoned that whereas in Maryland's scheme evidence remained "legally relevant" as long as one or more jurors found the presence of a mitigating circumstance supported by that evidence, in North Carolina's system any evidence introduced to support a mitigating factor that the jury did not unanimously find is legally "irrelevant" and can be excluded from jurors' consideration.

Held: North Carolina's unanimity requirement impermissibly limits jurors' consideration of mitigating evidence and hence is contrary to this Court's decision in *Mills, supra.* The State's Issue Four does not ameliorate the constitutional infirmity created by the requirement. Although the jury can opt for life imprisonment without finding any mitigating circumstances, it is required to make its decision based only on the circumstances it unanimously finds in Issue Two. Thus, one holdout juror can prevent the others from giving effect to evidence they feel calls for a lesser sentence; moreover, even if all the jurors agree that there are *some* mitigating circumstances, they cannot give effect to evidence supporting any of those circumstances unless they agree unanimously on the *same* circumstance. In addition, the state court's holding distorts the concept of relevance. The mitigating circumstances not unanimously found to be present by the jury did not become "irrelevant" to mitigation merely because one or more jurors either did not believe that the circumstance had been proved as a factual matter or did not think that the circumstance, though proved, mitigated the offense. Furthermore, the mere declaration that evidence is "legally irrelevant" cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less that death. *Skipper* v. *South Carolina*, 476 U. S. 1; *Eddings* v. *Oklahoma*, 455 U. S. 104. The State misplaces its reliance on *Patterson* v. *New York*, 432 U. S. 197, to support its view that the unanimity requirement is a standard of proof intended to ensure the reliability of mitigating evidence, as *Patterson* did not involve the validity of a capital sentencing procedure under the Eighth Amendment, which requires States to allow consideration of mitigating evidence. It is no answer that the jury is permitted to "consider" mitigating evidence when it decides collectively, under Issue Two, whether any mitigating circumstances exist. *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a death sentence, a consideration that may not be foreclosed by one or more jurors' failure to find a mitigating circumstance under Issue Two. Moreover, requiring unanimity on mitigating factors is not constitutional merely because the State also requires unanimity on aggravating circumstances. *Penry* v. *Lynaugh*, 492 U. S. 302, 327–328. Pp. 439–444.

323 N. C. 1, 372 S. E. 2d 12, vacated and remanded.

MARSHALL, J., delivered the opinion of the Court, in which BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. WHITE, J., *post*, p. 444, and BLACKMUN, J., *post*, p. 445, filed concurring opinions. KENNEDY, J., filed an opinion concurring in the judgment, *post*, p. 452. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C. J., and O'CONNOR, J., joined, *post*, p. 457.

Malcolm Ray Hunter, Jr., argued the cause for petitioner. With him on the briefs were *Gordon Widenhouse* and *Robert S. Mahler*.

Joan H. Byers, Special Deputy Attorney General of North Carolina, argued the cause for respondent. With her on the brief were *Lacy H. Thornburg*, Attorney General, *J. Michael Carpenter*, Special Deputy Attorney General, and *Steven F. Bryant* and *Barry S. McNeill*, Assistant Attorneys General.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this case we address the constitutionality of the unanimity requirement in North Carolina's capital sentencing scheme. That requirement prevents the jury from considering, in deciding whether to impose the death penalty, any mitigating factor that the jury does not unanimously find. We hold that under our decision in *Mills* v. *Maryland*, 486 U. S. 367 (1988), North Carolina's unanimity requirement violates the Constitution by preventing the sentencer from considering all mitigating evidence. We therefore vacate petitioner's death sentence and remand for resentencing.

I

Petitioner Dock McKoy, Jr., was convicted in Stanly County, North Carolina, of first-degree murder. During the sentencing phase of McKoy's trial, the trial court instructed the jury, both orally and in a written verdict form, to answer four questions in determining its sentence. Issue One asked:

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*A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Richard B. Iglehart*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Herbert F. Wilkinson* and *Dane R. Gillette*, Deputy Attorneys General, joined by *Don Siegelman*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *John J. Kelly*, Chief State's Attorney of Connecticut, *Michael J. Bowers*, Attorney General of Georgia, *James T. Jones*, Attorney General of Idaho, *Linley E. Pearson*, Attorney General of Indiana, *Frederic J. Cowan*, Attorney General of Kentucky, *William L. Webster*, Attorney General of Missouri, *Michael C. Moore*, Attorney General of Mississippi, *Brian McKay*, Attorney General of Nevada, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Robert H. Henry*, Attorney General of Oklahoma, *Ernest D. Preate, Jr.*, Attorney General of Pennsylvania, *Jim Mattox*, Attorney General of Texas, and *Mary Sue Terry*, Attorney General of Virginia.

"Do you unanimously find from the evidence, beyond a reasonable doubt, the existence of one or more of the following aggravating circumstances?" App. 6, 23. The jury found two statutory aggravating circumstances: that McKoy "had been previously convicted of a felony involving the use or threat of violence to the person"[1] and that the murder was committed against a deputy sheriff who was "engaged in the performance of his official duties."[2] The jury therefore answered "Yes" to Issue One and was instructed to proceed to the next Issue.

Issue Two asked: "Do you unanimously find from the evidence the existence of one or more of the following mitigating circumstances?" *Id.*, at 8, 24. The judge submitted to the jury eight possible mitigating circumstances. With respect to each circumstance, the judge orally instructed the jury as follows: "If you do not unanimously find this mitigating circumstance by a preponderance of the evidence, so indicate by having your foreman write, 'No,' in that space" on the verdict form. *Id.*, at 10–13. The verdict form reiterated the unanimity requirement: "In the space after each mitigating circumstance, write 'Yes,' if you unanimously find that mitigating circumstance by a preponderance of the evidence. Write, 'No,' if you do not unanimously find that mitigating circumstance by a preponderance of the evidence." *Id.*, at 24.

The jury unanimously found the statutory mitigating circumstance that McKoy's capacity "to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired."[3] It also unanimously found the nonstatutory mitigating circumstance that McKoy had a "borderline intellectual functioning with a IQ test score of 74." *Id.*, at 25. The jury did not, however, unanimously find the statutory mitigating circumstances that McKoy committed the crime while "under the influence of mental or emotional disturbance"[4] or that McKoy's age at the time of the crime, 65, was a mitigating factor.[5] The jury also failed to find unanimously four nonstatutory mitigating circumstances: that for several decades McKoy exhibited signs of mental or emotional disturbance or defect that went untreated; that McKoy's mental and emotional disturbance was aggravated by his poor physical health; that McKoy's ability to remember the events of the day of the murder was actually impaired; and that there was any other circumstance arising from the evidence that had mitigating value.[6]

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[1] N. C. Gen. Stat. § 15A–2000(e)(3) (1988).

[2] § 15A–2000(e)(8).

[3] § 15A–2000(f)(6).

Because the jury found the existence of mitigating circumstances, it was instructed to answer Issue Three, which asked: "Do you unanimously find beyond a reasonable doubt that the mitigating circumstance or circumstances *found by you* is, or are, insufficient to outweigh the aggravating circumstance or circumstances found by you?" *Id.*, at 13, 26 (emphasis added). The jury answered this issue "Yes," and so proceeded to the final issue. Issue Four asked: "Do you unanimously find beyond a reasonable doubt that the aggravating circumstance or circumstances found by you is, or are, sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstance or circumstances *found by you*?" *Id.*, at 14, 26 (emphasis added). The jury again responded "Yes." Pursuant to the verdict form and the court's instructions, the jury therefore made a binding recommendation of death.

During the pendency of petitioner's direct appeal to the North Carolina Supreme Court, this Court decided *Mills* v.

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[4] § 15A–2000(f)(2).

[5] § 15A–2000(f)(7).

[6] § 15A–2000(f)(9). Although this "catch-all" provision is provided by statute, it is grouped with the nonstaturory circumstances because it allows for the consideration of mitigating factors not statutorily specified.

Maryland, *supra*. There, we reversed a death sentence imposed under Maryland's capital punishment scheme because the jury instructions and verdict form created "a substantial probability that reasonable jurors . . . well may have thought they were precluded from considering any mitigating evidence unless all 12 jurors agreed on the existence of a particular such circumstance." *Id.*, at 384. We reasoned that allowing a "holdout" juror to prevent the other jurors from considering mitigating evidence violated the principle established in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), that a sentencer may not be precluded from giving effect to all mitigating evidence. 486 U. S., at 375.

Petitioner challenged his sentence on the basis of *Mills*. The North Carolina Supreme Court, in a split decision, purported to distinguish *Mills* on two grounds and therefore denied relief. First, it noted that "Maryland's procedure required the jury to impose the death penalty if it 'found' at least one aggravating circumstance and did not 'find' any mitigating circumstances" or "if it unanimously found that the mitigating circumstances did not outweigh the aggravating circumstances." 323 N. C. 1, 40, 372 S. E. 2d 12, 33 (1988). In contrast, the court stated, Issue Four in North Carolina's scheme allows the jury to recommend life imprisonment "if it feels that the aggravating circumstances are not sufficiently substantial to call for the death penalty, even if it has found several aggravating circumstances and no mitigating circumstances." *Ibid.*

Second, the court asserted that whereas in Maryland's scheme evidence remained "legally relevant" as long as one or more jurors found the presence of a mitigating circumstance supported by that evidence, *id.*, at 41, 372 S. E. 2d, at 34, "in North Carolina evidence in effect becomes legally irrelevant to prove mitigation if the defendant fails to prove to the satisfaction of all the jurors that such evidence supports the finding of a mitigating factor," *id.*, at 40, 372 S. E. 2d, at 33. The North Carolina Supreme Court believed that we had found the "relevance" of the evidence in *Mills* a significant factor because we had stated in a footnote that "'[n]o one has argued here, nor did the Maryland Court of Appeals suggest, that mitigating evidence can be rendered legally "irrelevant" by one holdout vote.'" *Id.*, at 41, 372 S. E. 2d, at 34 (quoting *Mills*, 486 U. S., at 375, n. 7). The court thus interpreted *Mills* as allowing States to define as "irrelevant" and to exclude from jurors' consideration any evidence introduced to support a mitigating circumstance that the jury did not unanimously find. Accordingly, the State Supreme Court upheld McKoy's death sentence.

II

Despite the state court's inventive attempts to distinguish *Mills*, our decision there clearly governs this case. First, North Carolina's Issue Four does not ameliorate the constitutional infirmity created by the unanimity requirement. Issue Four, like Issue Three, allows the jury to consider only mitigating factors that it unanimously finds under Issue Two. Although the jury may opt for life imprisonment even where it fails unanimously to find any mitigating circumstances, the fact remains that the jury is required to make its decision based only on those circumstances it unanimously finds. The unanimity requirement thus allows one holdout juror to prevent the others from giving effect to evidence that they believe calls for a "'sentence less than death.'" *Eddings* v. *Oklahoma*, 455 U. S. 104, 110 (1982), quoting *Lockett*, *supra*, at 604 (plurality opinion). Moreover, even if all 12 jurors agree that there are *some* mitigating circumstances, North Carolina's scheme prevents them from giving effect to evidence supporting any of those circumstances in their deliberations under Issues Three and Four unless they unanimously find the existence of the *same* circumstance. This is the precise defect that compelled us to strike down the Maryland scheme in *Mills*. See 486 U. S., at 374. Our decision in *Mills* was not limited to cases in which the jury is *required* to impose the death penalty if it finds that aggravating circumstances outweigh mitigating circumstances or that no mitigating circumstances exist at all. Rather, we held that it would be the "height of arbitrariness to allow *or* require the imposition of the death penalty" where 1 juror was able to prevent the other 11 from giving effect to mitigating evidence. *Ibid.* (emphasis added).

Second, the State Supreme Court's holding that mitigating evidence is "relevant" only if the jury unanimously finds that it proves the existence of a mitigating circumstance distorts the concept of relevance. "[I]t is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *New Jersey* v. *T. L. O.*, 469 U. S. 325, 345 (1985), quoting Fed. Rule Evid. 401. The meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding. As the Chief Justice of the North Carolina Supreme Court stated in dissent in this case:

> "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. Whether the fact-finder accepts or rejects the evidence has no bearing on the evidence's relevancy. The relevance exists even if the fact-finder fails to be persuaded by that evidence. It is not necessary that the item of evidence alone convinces the trier of fact or be sufficient to convince the trier of fact of the truth of the proposition for which it is offered." 323 N. C., at 55–56, 372 S. E. 2d, at 45 (Exum, C. J., dissenting), citing M. Graham, Handbook of Federal Evidence §401.1, n. 12 (2d ed. 1986).

Clearly, then, the mitigating circumstances not unanimously found to be present by the jury did not become "irrelevant" to mitigation merely because one or more jurors either did not believe that the circumstance had been proved as a factual matter or did not think that the circumstance, though proved, mitigated the offense.[7]

Furthermore, our holdings in *Skipper* v. *South Carolina*, 476 U. S. 1 (1986), and *Eddings* v. *Oklahoma*, *supra*, show that the mere declaration that evidence is "legally irrelevant" to mitigation cannot bar the consideration of that evidence if the sentencer could reasonably find that it warrants a sentence less than death. In *Skipper*, the trial court had excluded as irrelevant to mitigation evidence that the defendant had adjusted well to prison life. This Court reversed the death sentence on the ground that such evidence was "by its nature relevant to the sentencing determination" because it might convince the jury that the defendant "would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment." 476 U. S., at 7. Similarly, in *Eddings*, the sentencing court had ruled that it was precluded by law from considering evidence of the defendant's troubled childhood and emotional disturbance. The State Court of Criminal Appeals affirmed, holding that such evidence was irrelevant to mitigation because it did not support a legal excuse from criminal liability. This Court reversed on the ground that such evidence was undoubtedly relevant to mitigation even if it did not *excuse* the defendant's conduct. 455 U. S., at 113–116.

Nor can the State save the unanimity requirement by characterizing it as a standard of proof intended to ensure the reliability of mitigating evidence. The State's reliance on

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[7] In North Carolina's capital sentencing scheme, if the jury finds a statutory mitigating circumstance to be present, that circumstance is deemed to have mitigating value as a matter of law. *State* v. *Stokes*, 308 N. C. 634, 653, 304 S. E. 2d 184, 196 (1983). For nonstatutory mitigating circumstances, the jury must decide both whether the circumstance has been proved and whether it has mitigating value. See *State* v. *Pinch*, 306 N. C. 1, 26, 292 S. E. 2d 203, 223, cert. denied, 459 U. S. 1056 (1982), citing *State* v. *Johnson*, 298 N. C. 47, 72–74, 257 S. E. 2d 597, 616–617 (1979).

Patterson v. *New York*, 432 U. S. 197 (1977), is misplaced. In that case, this Court rejected a due process challenge to a New York law requiring a defendant charged with second-degree murder to prove by a preponderance of the evidence the affirmative defense of extreme emotional disturbance in order to reduce the crime to manslaughter. The Court reasoned that a State is not constitutionally required to provide that affirmative defense. But if a State "nevertheless chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may assure itself that the fact has been established with reasonable certainty." *Id.*, at 209. *Patterson*, however, did not involve the validity of a capital sentencing procedure under the Eighth Amendment. The Constitution *requires* States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall. As we stated in *Mills:*

> "Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, *Lockett* v. *Ohio*, *supra; Hitchcock* v. *Dugger*, 481 U. S. 393 (1987); by the sentencing court, *Eddings* v. *Oklahoma*, *supra;* or by an evidentiary ruling, *Skipper* v. *South Carolina*, *supra*. The same must be true with respect to a single juror's holdout vote against finding the presence of a mitigating circumstance. Whatever the cause, . . . the conclusion would necessarily be the same: 'Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of *Lockett*, it is our duty to remand this case for resentencing.' *Eddings* v. *Oklahoma*, 455 U. S., at 117, n. (O'CONNOR, J., concurring)." 486 U. S., at 375.

It is no answer, of course, that the jury is permitted to "consider" mitigating evidence when it decides collectively, under Issue Two, whether any mitigating circumstances exist. Rather, *Mills* requires that each juror be permitted to consider and give effect to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death. This requirement means that, in North Carolina's system, each juror must be allowed to consider all mitigating evidence in deciding Issues Three and Four: whether aggravating circumstances outweigh mitigating circumstances, and whether the aggravating circumstances, when considered with any mitigating circumstances, are sufficiently substantial to justify a sentence of death. Under *Mills*, such consideration of mitigating evidence may not be foreclosed by one or more jurors' failure to find a mitigating circumstance under Issue Two.

Finally, we reject the State's contention that requiring unanimity on mitigating circumstances is constitutional because the State also requires unanimity on aggravating circumstances. The Maryland scheme in *Mills* also required unanimity on both mitigating and aggravating circumstances. See *id.*, at 384–389. Such consistent treatment did not, however, save the unanimity requirement for mitigating circumstances in that case. A State may not limit a sentencer's consideration of mitigating evidence merely because it places the same limitation on consideration of aggravating circumstances. As the Court stated in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989):

> "'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.' *McCleskey* v. *Kemp*, 481 U. S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." *Id.*, at 327–328.

III

We conclude that North Carolina's unanimity requirement impermissibly limits jurors' consideration of mitigating evidence and hence is contrary to our decision in *Mills*.[8] We therefore vacate the petitioner's death sentence and remand this case to the North Carolina Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE WHITE, concurring.

There is nothing in the Court's opinion, as I understand it, that would invalidate on federal constitutional grounds a jury instruction that does not require unanimity with respect to mitigating circumstances but requires a juror to consider a mitigating circumstance only if he or she is convinced of its existence by a preponderance of the evidence. Under such an instruction, any juror must weigh in the balance any mitigating circumstance that in his or her mind is established by a preponderance of the evidence, whether or not any other jurors are likewise convinced. Neither does the Court's opinion hold or infer that the Federal Constitution forbids a State to place on the defendant the burden of persuasion with respect to mitigating circumstances. On this basis, I concur in the Court's opinion.

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[8] In fact, this case presents an even clearer case for reversal than *Mills* v. *Maryland*, 486 U. S. 367 (1988). In *Mills*, the Court divided over the issue whether a reasonable juror could have interpreted the instructions in that case as allowing individual jurors to consider only mitigating circumstances that the jury unanimously found. Compare *id.*, at 375–384, with *id.*, at 391–395 (REHNQUIST, C. J., dissenting). Indeed, the dissent in *Mills* did not challenge the Court's holding that the instructions, if so interpreted, were unconstitutional. In this case, by contrast, the instructions and verdict form expressly limited the jury's consideration to mitigating circumstances unanimously found.

JUSTICE BLACKMUN, concurring.

I join the Court's opinion, but write separately only to underscore my conviction that *Mills* v. *Maryland*, 486 U. S. 367 (1988), controls this case and that *Mills* was correctly decided.

I

In the dissent's view, the Court in *Mills* simply *assumed*, but did not decide, the invalidity of a requirement that mitigating factors could be considered by the jury only if they were found unanimously. That characterization cannot be squared with the text of the *Mills* opinion. Part II of that opinion directly addressed the question whether such a requirement was permissible. The Court concluded that a rule mandating unanimous agreement before any juror could consider a particular mitigating factor was forbidden by our decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982). That conclusion was an essential step in the Court's rationale for overturning the Maryland statute. Ambiguous jury instructions, even in a capital case, do not violate the Eighth Amendment simply because they are ambiguous. And the question addressed in Part III of the opinion—whether a reasonable juror might have interpreted the instructions as precluding his consideration of any mitigating factor not found unanimously—would have been wholly lacking in constitutional significance if such a rule were permissible. Rather, the Maryland instructions were held to be invalid because they were susceptible of two plausible interpretations, *and under one of those interpretations the instructions were unconstitutional.*

The dissent acknowledges that "there is language in *Mills* . . . suggesting that a unanimity requirement would contravene this Court's decisions." *Post*, at 459. The dissent contends, however, that any such suggestions were dicta. In the dissent's view the propriety of a unanimity requirement was not properly before the Court, since Maryland had conceded that such a requirement would be unconstitutional and argued only that its instructions imposed no such rule. That position is untenable.

First, even if the issue had not been disputed, the Court's resolution of the question would constitute a binding precedent. It is unusual, but hardly unheard of, for this Court to decide significant legal questions on which the parties have not joined issue. See, *e. g.*, *Teague* v. *Lane*, 489 U. S. 288 (1989); *Penry* v. *Lynaugh*, 492 U. S. 302, 313–314 (1989) (holding that *Teague* principles apply to capital sentencing). Although the wisdom of deciding such issues without briefing and argument has been questioned, see *Teague*, 489 U. S., at 326–327 (BRENNAN, J., dissenting); *Penry*, 492 U. S., at 349 (STEVENS, J., concurring in part and dissenting in part), it has not been suggested heretofore that such decisions are lacking in precedential value. The dissent's approach to *stare decisis* would allow a respondent before this Court, by means of a timely concession, to avoid resolution of a recurring legal question so that it might be litigated at a more propitious time.[1] This approach would require that litigants seeking to rely on a decision of this Court must scour the briefs in order to determine what points were and were not contested. That is not and cannot be the law.

Moreover, the dissent distorts the record in contending that the propriety of a unanimity requirement was not at issue in *Mills*. The argument section of the petitioner's brief in *Mills* began: "The underlying question is whether the Maryland Legislature may constitutionally require unanimous agreement by the jurors before any mitigating circumstance may be considered in the weighing process." Brief for Petitioner, O. T. 1987, No. 87–5367, p. 9. The bulk of the State's response was devoted to the argument that no reasonable juror would interpret the instructions in the manner that Mills suggested was possible. The State also contended, however:

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[1] Cf. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 632 (1953) ("[V]oluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i. e.*, does not make the case moot").

> "Under the interpretation of the statute proffered by Petitioner, an unconstitutional restriction existed in that unanimity on a particular mitigating circumstance was required before it could be weighed in determining the appropriate sentence. However, *Lockett* and *Eddings* relate to restrictions on 'input,' not the subsequent deliberative process. Although a jury has twelve component parts, it is a single entity. The rejection of a mitigating circumstance, after introduction and full consideration of the evidence, is simply a factual determination. There is no legal impediment to the consideration of the evidence. The requirement of jury unanimity is simply not the type of restriction found unconstitutional in *Lockett* and *Eddings*. *See State* v. *Kirkley*, 308 N. C. 196, 302 S. E. 2d 144, 157 (1983)." Brief for Respondent in *Mills* 19–20 (footnotes omitted).

The dissent quotes the first sentence of this passage, characterizing it as a "concession" by the State that a unanimity requirement would be invalid. *Post*, at 459. But since the remainder of the paragraph sets forth precisely the same argument in defense of the unanimity requirement that the dissent advances today, compare *post*, at 465–466,[2] the suggestion that Maryland conceded the point is rather peculiar. Indeed, the paragraph quoted above concludes with a citation to *Kirkley*—the North Carolina case which first upheld against constitutional attack the requirement that a jury could consider only those mitigating factors unanimously found. Read in context, the sentence quoted by the dissent is plainly a *summary* of Mills' argument, not an admission of its correctness. The Maryland Court of Appeals had concluded that a unanimity requirement would violate the Eighth Amendment, but had determined that the challenged instructions imposed no such requirement. The State, however, was clearly entitled to defend the Court of Appeals' judgment on the alternative ground that, even if a reasonable jury might have read the instructions as requiring a unanimous finding before any mitigating factor could be considered, that requirement would not contravene the dictates of *Lockett* and *Eddings*. The State raised precisely this argument, and this Court rejected it.[3]

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[2] Also compare Brief for Respondent in *Mills* 20, n. 7 ("Petitioner views a jury as twelve independent sentencers operating free of the views of the others. Such a view is completely contrary to any notion of guided discretion"), with *post*, at 469 ("Likewise incompatible with the Court's theory is the principle of guided discretion that we have previously held to be essential to the validity of capital sentencing. . . . There is little guidance in a system that requires each individual juror to bring to the ultimate decision his own idiosyncratic notion of what facts are mitigating, untempered by the discipline of group deliberation and agreement").

II

I remain convinced, moreover, that *Mills* was correctly decided. It is apparent to me that the rule at issue here implicates the concerns expressed in *Lockett* and *Eddings*. In my view it is pointless to ask whether the sentencer in this case is the jury or the jurors. The jurors *are* the jury: and if 11 of them are forbidden to give effect to mitigating evidence which they deem persuasive, then the right guaranteed by *Lockett* has been effectively negated, even if the restriction is imposed by the 12th member of the sentencing body. If state law provided that all mitigating evidence was first to be presented to the foreperson, who could then decide what portions of it other jurors would be allowed to view, I have no doubt that the sentencer's ability to give effect to the evidence would be impaired. The fact that North Carolina permits any 1 of 12 individuals to exercise the veto hardly makes the impairment less severe.

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[3] Nor does JUSTICE WHITE's separate opinion in *Mills* v. *Maryland*, 486 U. S. 367, 389 (1988), provide a basis for recharacterizing the holding of the Court. I am far from certain that JUSTICE WHITE's concurrence will bear the construction that the dissent places upon it. In any event, the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative.

The dissent suggests that the rule announced in *Mills* is an aberration, a quirk of our Eighth Amendment jurisprudence. In fact, however, it is the North Carolina unanimity requirement which represents an extraordinary departure from the way in which juries customarily operate. Juries are typically called upon to render unanimous verdicts on the ultimate issues of a given case. But it is understood that different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.[4] Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict.[5]

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[4] Moreover, the jury's inability to agree as to an ultimate issue typically results in a deadlock or hung jury. Here the inability to agree requires the jury to proceed upon the assumption that a particular mitigating circumstance has been proved *not* to exist.

[5] There is one significant exception to this principle, but it does not support the dissent's position. In federal criminal prosecutions, where a unanimous verdict is required, the Courts of Appeals are in general agreement that "[u]nanimity . . . means more than a conclusory agreement that the defendant has violated the statute in question; there is a requirement of substantial agreement as to the principal factual elements underlying a specified offense." *United States* v. *Ferris*, 719 F. 2d 1405, 1407 (CA9 1983). Accord, *United States* v. *Duncan*, 850 F. 2d 1104, 1110–1115 (CA6 1988); *United States* v. *Beros*, 833 F. 2d 455, 461 (CA3 1987); *United States* v. *Schiff*, 801 F. 2d 108, 114 (1986), cert. denied, 480 U. S. 945 (1987); *United States* v. *Gipson*, 553 F. 2d 453, 456–459 (CA5 1977). But see *United States* v. *Bouquett*, 820 F. 2d 165, 169 (CA6 1987) (questioned in *Duncan*, 850 F. 2d, at 1112–1113). This rule does not require that each bit of evidence be unanimously credited or entirely discarded, but it does require unanimous agreement as to the nature of the defendant's violation, not simply the fact that a violation has occurred. The North Carolina requirement that *aggravating* circumstances be found unanimously therefore has some analogue, albeit imperfect, in another area of the law. This

We might compare, for example, a criminal trial in which the defendant presents the testimony of an alibi witness. It surely could not be supposed that the State could enforce an evidentiary rule requiring a preliminary jury determination as to the credibility of this evidence, and providing that no juror could give it weight unless *every* juror deemed it worthy of belief. Such a rule would plainly interfere with the ability of the accused to present a defense to the factfinder, just as the rule at issue here impairs the defendant's right to have evidence in mitigation considered by the sentencer.

As the dissent points out, our cases have upheld state rules that place upon criminal defendants the burden of proving affirmative defenses. See, *e. g.*, *Patterson* v. *New York*, 432 U. S. 197 (1977). For two reasons, however, these cases are not on point. First, the Court's reasoning in the affirmative-defense cases appears to rest upon a "greater power includes the lesser" argument: since the State is not constitutionally required to recognize the defense at all, it may take the lesser step of placing the burden of proof upon the defendant. See *id.*, at 209. But since the State may *not* exercise the greater power of prohibiting a capital defendant from introducing mitigating evidence, that reasoning is inapposite here. Second, the dissent's analogy to the affirmative-defense cases confuses the concepts of unanimity and burden of proof. To say that the burden of proof may be placed upon the defendant says nothing at all about the situation in which some jurors, but not others, believe that the burden has been satisfied. The dissent's analogy presumes that once the elements of an offense have been proved, the jury's failure to agree as

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principle is a protection for the *defendant*, however; its premise is that "[r]equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." *Gipson*, 553 F. 2d, at 458. There is no analogous principle requiring that jurors voting to acquit must agree upon the basis for their reasonable doubt.

to an affirmative defense results in a conviction (just as a North Carolina jury's failure to agree as to the presence of a given mitigating factor creates a "finding" that the factor is not present); but our cases do not say that, and it is not at all clear that a conviction, rather than a hung jury, would be the outcome. See *State* v. *Harris*, 89 R. I. 202, 207, 152 A. 2d 106, 109 (1959) (although the defendant bears the burden of proof as to insanity, "there is a vast difference between an instruction as to the persuasiveness of evidence and an instruction as to *agreement*. If the jury could not agree upon defendant's sanity then no verdict could be reached") (emphasis in original). The peculiar infirmity of the North Carolina sentencing procedure is not simply that it places the burden of proving mitigation upon the defendant, but that all disagreements among the jurors as to whether that burden has been satisfied must be resolved in favor of the State.

III

In *Mills*, the Court described two scenarios in which the operation of the unanimity requirement would result in a sentence of death, even though 11 (in the first scenario) or all 12 of the jurors believed that the mitigating circumstances outweighed those in aggravation. In the first hypothetical, 11 jurors believed that six mitigating factors were present, but the twelfth juror's veto prevented any of the evidence in mitigation from being considered at the final stage of the sentencing process. 486 U. S., at 373–374. In the second scenario, all 12 jurors agreed that *some* mitigating factors were present, and outweighed the factors in aggravation, but the jury was not unanimous as to the existence of any particular mitigating circumstance. *Id.*, at 374. We concluded that "it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty under the circumstances so postulated." *Ibid.* That assessment seems to me unanswerable.

Of course, the North Carolina statute also requires that the jury be unanimous as to the existence of a given *aggravating* factor, and as to the appropriateness of the death penalty in light of the aggravating and mitigating circumstances unanimously found. The possibility that a single juror with aberrational views will thwart the majority therefore sometimes may work in favor of the capital defendant. But the injustice of a capital sentence in a case where 11 jurors believe that mitigation outweighs aggravation is hardly compensated for by the possibility that in some *other* case a defendant will escape the death penalty when 11 jurors believe death to be appropriate. The State's reliance on the "symmetry" of its law seems to me to be the very antithesis of the constitutional command that the sentencer be allowed to consider the "character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion). I therefore agree that petitioner's death sentence must be vacated, and I join the opinion of the Court.

JUSTICE KENNEDY, concurring in the judgment.

Jury unanimity, it is true, is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community. Yet the unique interaction of the elements of the sentencing statute in issue here can allow the same requirement of unanimity to produce a capital sentence that lacks unanimous support of the jurors, and, more than this, is thought to be inappropriate by 11 of the 12.

As a consequence, the statute here can operate in the same manner as the jury instructions in *Mills* v. *Maryland*, 486 U. S. 367 (1988), as construed by the majority in that case, to produce a result that is "the height of arbitrariness." On this sole rationale, I concur in the judgment here. The

Court's reliance on our decisions in *Lockett* v. *Ohio,* 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982), to support today's result stretches those cases beyond their proper bounds and threatens to add confusion to an already troubled area of our jurisprudence.

That this case may be resolved on a ground more consistent with our precedents is evident from the *Mills* opinion itself. The relevant section of that decision begins:

> "Petitioner's argument is straightforward, and well illustrated by a hypothetical situation he contends is possible under the Maryland capital sentencing scheme:
>
> "'If eleven jurors agree that there are six mitigating circumstances, the result is that no mitigating circumstance is found. Consequently, there is nothing to weigh against any aggravating circumstance found and the judgment is death even though eleven jurors think the death penalty wholly inappropriate.' Brief for Petitioner 11." 486 U. S., at 373–374.

Petitioner's counsel emphasized this point in the brief discussion of constitutionality in the *Mills* oral argument:

> "The problem with the constitutionality is that . . . you have the possibility of not 12 jurors agreeing but one juror deciding it's death. And our position, of course, is it's difficult to imagin[e] a more arbitrary system than luck of the draw: do I get one juror?" Tr. of Oral Arg., O. T. 1987, No. 87–5367, pp. 23–24.

The central idea of these passages is that the death penalty should not be imposed on the basis of a single juror's vote where 11 jurors think the penalty undeserved. The Court stated: "The possibility that a single juror could block [consideration of a mitigating factor], and *consequently require the jury to impose the death penalty,* is one we dare not risk." 486 U. S., at 384 (emphasis added).

Application of the death penalty on the basis of a single juror's vote is "intuitively disturbing." *Id.*, at 374. More important, it represents imposition of capital punishment through a system that can be described as arbitrary or capricious. The Court in *Mills* described such a result as the "height of arbitrariness." *Ibid.* Given this description, it is apparent that the result in *Mills* fits within our line of cases forbidding the imposition of capital punishment on the basis of "caprice," in "an arbitrary and unpredictable fashion," or through "arbitrary" or "freakish" means. See, *e. g.*, *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988); *California* v. *Brown*, 479 U. S. 538, 541 (1987).

A holdout juror incident can occur under North Carolina's statute if all jurors find an aggravating factor they agree to be of sufficient gravity to support a penalty of death, and 11 jurors find an outweighing mitigating factor that one juror refuses, for whatever reason, to accept. If the jurors follow their instructions, as we must assume they will, the 11 must disregard the mitigating circumstance. After the balancing step of the statute is performed, there can be only one result. The "'judgment is death even though eleven jurors think the death penalty wholly inappropriate.'" *Mills*, *supra*, at 374. Given the reasoned, moral judgment inherent in capital sentencing by the jury, the extreme arbitrariness of this potential result is evident.

This said, it must be stressed that much in the opinion for the Court in today's case goes, without cause, much further. It is true that, in addition to discussing the extreme arbitrariness of the statute at issue, the *Mills* opinion went on to state that the unanimity requirement was inconsistent with our holdings in *Lockett*, *Eddings*, *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987), and *Skipper* v. *South Carolina*, 476 U. S. 1 (1986). Even so, the Court stressed that the unanimity requirement there, combined with the final stage of the Maryland statute, could produce an arbitrary result: "a jury that does not unanimously agree on the existence of any mitigating circumstance may not give mitigating evidence any effect whatsoever, and *must impose the sentence of death.*" 486 U. S., at 375 (emphasis added).

I cannot agree with the Court's statement today that "[o]ur decision in *Mills* was not limited to cases in which the jury is *required* to impose the death penalty if it finds that aggravating circumstances outweigh mitigating circumstances or that no mitigating circumstances exist at all."* *Ante*, at 439–440 (emphasis in original). The statute in *Mills* did include such a requirement, and the statute here also, albeit in more limited circumstances, can allow 1 juror's decision to override that of 11 others as to the defendant's ultimate sentence. It is for this reason only that I concur in the judgment vacating the sentence.

I would recognize the arbitrary operation of the North Carolina system as the exclusive basis of our decision, for the unanimity requirement, standing alone, is not invalid under our *Lockett* line of cases. In *Lockett* itself, we invalidated an Ohio statute that precluded presentation of certain types of mitigating evidence to the jury. In *Eddings*, *Skipper*, and *Hitchcock*, we applied the same rule to judicial instructions that barred consideration of certain nonstatutory evidence bearing on the defendant's character. More recently, in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), we held that *Lockett*'s requirements were not met in a statutory scheme that provided no avenue through which mitigating evidence could be considered, no matter how clearly the evidence in mitigation might have been established for the jury, thereby making its presentation meaningless.

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*Indeed, the broad language of today's opinion might be read to suggest that a scheme requiring jury unanimity as to the presence *or absence* of a mitigating factor could violate the Constitution. Such a requirement, however, enhances the reliability of the jury's decision without any risk that a single holdout juror may impose a sentence against the views of the other 11. Maryland claimed that its unanimity requirement operated this way in *Mills*. It is no surprise that the majority in *Mills* assumed such a scheme would be constitutional.

Lockett and its progeny stand only for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all. The requirement that a jury unanimously find mitigating circumstances in itself does none of these things. In a State where there is no final mandatory or balancing stage in the sentencing process that could allow a single juror to control the ultimate outcome, it simply imposes a proof requirement that must be met before the evidence can be used as a mitigating factor specifically found by the jury as a whole. As we stated in *Saffle* v. *Parks*, *post*, at 490, there is a "simple and logical difference between rules that govern *what* factors the jury must be permitted to consider in making the sentencing decision and rules that govern *how* the State may guide the jury in considering and weighing those factors in reaching a decision." The extreme control given to one juror in the North Carolina scheme in effect can allow that juror alone to impose a capital sentence. It is that fact, and not a novel application of *Lockett* to requirements intended to enhance the reliability of the jury's findings, that is dispositive.

The description of a "one juror veto" system in *Mills* as the "height of arbitrariness" supports the result here, and I would decide this case on that basis alone. I agree with JUSTICE WHITE, *ante*, at 444, that the discussion of *Lockett* in today's opinion casts no doubt on evidentiary requirements for presentation of mitigating evidence such as assigning the burden of proof to the defendant or requiring proof of mitigating circumstances by a preponderance of the evidence. His opinion and our other cases already make clear that the discussion of *Lockett* in today's opinion has no application beyond the issue presented in this case. Because of my concern that the opinion itself might otherwise have spawned confusing capital litigation over novel and unsupportable

Lockett claims in the lower courts, I can concur only in the Court's judgment.

JUSTICE SCALIA, with whom THE CHIEF JUSTICE and JUSTICE O'CONNOR join, dissenting.

Today the Court holds that the Eighth Amendment prohibits a State from structuring its capital sentencing scheme to channel jury discretion by requiring that mitigating circumstances be found unanimously. Because I believe that holding is without support in either the Eighth Amendment or our previous decisions, I dissent.

I

Under North Carolina's capital sentencing scheme, once a defendant is found guilty of capital murder, a separate sentencing hearing is held at which the State is permitted to introduce evidence of aggravating circumstances, and the defendant evidence of mitigating circumstances. Specific aggravating and mitigating circumstances are defined by statute, but the defendant is permitted to put forward any other mitigating circumstance he wishes. The State must prove the existence of the specified aggravating circumstances beyond a reasonable doubt, and the defendant must prove the existence of mitigating factors by a preponderance of the evidence. For any aggravating or mitigating circumstance to be given operative effect, it must be found unanimously by the jury. Absent unanimity, the proponent of the circumstance has failed to meet his burden of persuasion, and the circumstance will be considered not proved.

In this case, the jury was given a special verdict form on which it was asked to answer four questions. First, whether it unanimously found beyond a reasonable doubt one or more specified statutory aggravating circumstances. The jury answered "Yes" with respect to two aggravating circumstances. Second, whether it unanimously found by a preponderance of the evidence any statutory or nonstatutory mitigating circumstances. The jury answered "Yes" with respect to one statutory, and one nonstatutory, mitigating circumstance. Third, whether it unanimously found beyond a reasonable doubt that the mitigating circumstances it found were insufficient to outweigh the aggravating circumstances it found. The jury answered "Yes." Fourth, whether it unanimously found beyond a reasonable doubt that the aggravating circumstances it found were sufficiently substantial to call for the imposition of the death penalty when considered with the mitigating circumstances it found. The jury answered "Yes."

I think this scheme, taken as a whole, satisfies the due process and Eighth Amendment concerns enunciated by this Court. By requiring that the jury find at least one statutory aggravating circumstance, North Carolina has adequately narrowed the class of death-eligible murderers. See *Zant* v. *Stephens*, 462 U. S. 862, 877–879 (1983). On the other hand, by permitting the jury to consider evidence of, and find, *any* mitigating circumstance offered by the defendant, North Carolina has ensured that the jury will "be able to consider and give effect to that evidence in imposing sentence." *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989). By requiring both aggravating circumstances to be found unanimously (beyond a reasonable doubt) and mitigating circumstances to be found unanimously (by only a preponderance of the evidence), North Carolina has "reduc[ed] the likelihood that [the jury] will impose a sentence that fairly can be called capricious or arbitrary." *Gregg* v. *Georgia*, 428 U. S. 153, 194–195 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). Finally, by requiring the jury unanimously to find beyond a reasonable doubt not only that the aggravating circumstances outweigh the mitigating circumstances, but also that they are sufficiently substantial in light of the mitigating circumstances to justify the death penalty, North Carolina has provided even an extra measure of assurance that death will not be lightly or mechanically imposed.

II

Before discussing the constitutional issue petitioner raises, I wish to address briefly the Court's assertion that we have already addressed and resolved this very issue in the past—that "our decision [in *Mills*] clearly governs this case." *Ante*, at 439. Although there is language in *Mills* v. *Maryland*, 486 U. S. 367 (1988), suggesting that a unanimity requirement would contravene this Court's decisions in *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), that issue plainly was not presented in *Mills*, and can therefore not have been decided.

The Court's opinion in *Mills* begins by recounting that the Maryland Court of Appeals "did not dispute that if the statute and [verdict] form were read as petitioner suggested [*i. e.*, to require mitigating factors to be found unanimously], jurors *would be* improperly prevented from giving due consideration to mitigating evidence." *Mills, supra*, at 372 (emphasis in original). The State itself made the same concession in its brief before this Court. ("Under the interpretation of the statute proffered by Petitioner, an unconstitutional restriction existed in that unanimity on a particular mitigating circumstance was required before it could be weighed in determining the appropriate sentence." Brief for Respondent in *Mills* v. *Maryland*, O. T. 1987, No. 87-5367, p. 19.)[1]

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[1] Justice Blackmun contends that the State "defend[ed] the Court of Appeals' judgment on the alternative ground that, even if a reasonable jury might have read the instructions as requiring a unanimous finding before any mitigating factor could be considered, that requirement would not contravene the dictates of *Lockett* and *Eddings*." *Ante*, at 448. Presumably that defense would have gone somewhat as follows:

"Even though the Court of Appeals has authoritatively determined that Maryland law entitled this defendant to a jury instruction requiring a life sentence if any single juror found sufficient mitigation; and even though, as petitioner contends, the instruction here mistakenly required unanimity on

Accordingly, no controversy regarding the question that the Court today holds to have been decided by *Mills* was even before the Court—for the very simple reason that no statute

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mitigation; you must nevertheless uphold the death sentence because, even though Maryland law did not in fact require unanimity, requiring it would not be unconstitutional."

It is facially implausible that Maryland's Attorney General would be rash enough to make this argument—and even more implausible that we would entertain it on its merits, rejecting it only because a unanimity requirement would, too, be unconstitutional. Quite obviously, the constitutional issue is irrelevant. *Whether or not* Maryland law could constitutionally require unanimity, the Court of Appeals authoritatively determined that it did not do so; and a death sentence based upon an erroneous instruction to that effect would have to be set aside. JUSTICE BLACKMUN is correct that "[a]mbiguous jury instructions, even in a capital case, do not violate the Eighth Amendment simply because they are ambiguous," *ante*, at 445, but they do violate the Due Process Clause if they misstate the law to the defendant's detriment—and it is not essential to that violation that the law as misstated be an unconstitutional law. Thus, to take the most extreme example, if state law, as authoritatively interpreted by the State's Supreme Court, does not authorize the death penalty for a certain offense, the Due Process Clause would not permit a state trial court to impose it even if the jury instructions comported with the Eighth Amendment. See *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980) (where state law requires jury sentencing, state courts may not enforce sentence not imposed by jury).

The single passage JUSTICE BLACKMUN relies upon from the the State's brief does not support the unlikely proposition that the State made the previously described argument. It is plainly addressing the constitutionality, not of the erroneous instruction petitioner asserted had been given, but of the instruction provided by Maryland law as interpreted by the Court of Appeals. This is clear because it discusses the constitutionality of requiring unanimity for "[t]he *rejection* of a mitigating circumstance," Brief for Respondent in *Mills* 19 (emphasis added). That was the Court of Appeals' theory of what Maryland law required, whereas petitioner had argued that the instruction actually given required a mitigating circumstance to be rejected if even a single juror objected. The quoted passage appears, moreover, in a section of the brief entitled "*The Maryland Court of Appeals' interpretation* of the statutory scheme is constitutional," *id.*, at 14 (emphasis added), which is a subdivision of a part of the brief entitled: "THE MARYLAND CAPITAL PUNISHMENT STATUTE *AS INTERPRETED BY THE MARYLAND COURT OF APPEALS* PERMITS *raising* that question was before the Court. The Maryland court had adopted what it regarded as a saving construction of the statute (*i. e.*, permitting a single juror's view to preclude rejection of a mitigating circumstance) and had said that the verdict form should be understood in that fashion. Before this Court, "[t]he critical question," and the only question disputed by the parties, was "whether petitioner's interpretation of the sentencing process is one a reasonable jury could have drawn from the instructions given by the trial judge and from the verdict form employed in this case." *Mills*, 486 U. S., at 375–376.[2] On the answer to *that* question, the Court was divided. Five Justices found a substantial risk that the jury would have understood its instructions

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FULL CONSIDERATION OF EVIDENCE PRESENTED IN MITIGATION OF SENTENCE," *id.*, at 8 (emphasis added). JUSTICE BLACKMUN is correct that *State* v. *Kirkley*, 308 N. C. 196, 218–219, 302 S. E. 2d 144, 157 (1983), *could* be cited for the proposition that the trial court's instructions, interpreted as Mills would have it (and if Maryland law provided for such instructions), would be constitutional. But in fact Maryland's brief cited it for the more limited point that the unanimity requirements in the law as interpreted by the Court of Appeals (for both acceptance *and rejection* of mitigation, but with an automatic life sentence in the event of deadlock) do not interfere with the "consideration of evidence" and thus do not for that reason violate *Lockett* and *Eddings*. Brief for Respondent in *Mills* 20. Finally, if JUSTICE BLACKMUN were correct that the State had sought to defend the constitutionality of Mills' interpretation of the scheme, one would have expected the State at least to have mentioned that significant point at oral argument; it did not.

[2] JUSTICE BLACKMUN's citation of cases in which we decided an issue that was not argued, *ante*, at 446, is irrelevant. Deciding what was not argued is quite different from deciding what was not presented. The situation in *Mills* was not merely that no one spoke in defense of the constitutionality of a statute similar to the one now before us; nor even merely that no one had an *interest* to speak in its defense; but that the constitutionality of such a statute was irrelevant to the outcome of the case. *No such statute was presented by the facts*, the Maryland Court of Appeals having interpreted its statute differently. It is extraordinary to suggest that we could pronounce authoritatively upon the constitutionality of a statute that did not exist.

as requiring it to reject all mitigating circumstances that it failed to find unanimously, and (as the State understood would be the necessary consequence of such a finding) vacated the judgment and remanded for further proceedings. *Id.*, at 381–384. The four dissenting Justices thought the risk that a reasonable jury would have misunderstood the instructions was negligible, and thus would have affirmed. *Id.*, at 391–393 (REHNQUIST, C. J., dissenting).

The Court's characterization of *Mills* as "holding that the instructions, if [interpreted to require unanimity], were unconstitutional," *ante*, at 444, n. 8, and "strik[ing] down the Maryland scheme," *ante*, at 439, is pure revisionism. No Maryland scheme existed except the one authoritatively described by the Maryland Court of Appeals, see *Mullaney* v. *Wilbur*, 421 U. S. 684, 690–691 (1975)—which did *not* require a unanimous finding of mitigation for the defendant to receive a life sentence. To be sure, *Mills* contains language suggesting that a unanimity requirement would contravene *Lockett* and *Eddings*. See *Mills*, 486 U. S., at 374–375. But, under the circumstances, these suggestions were plainly dicta. Any doubt is resolved by JUSTICE WHITE's separate concurrence, which states in its entirety:

> "The issue in this case is how reasonable jurors would have understood and applied their instructions. That is the issue the Court's opinion addresses, and I am persuaded that the Court reaches the correct solution. Hence, I join the Court's opinion." *Id.*, at 389–390.[3]

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[3] JUSTICE BLACKMUN states that "the meaning of a majority opinion is to be found within the opinion itself; the gloss that an individual Justice chooses to place upon it is not authoritative." *Ante*, at 448, n. 3. That is certainly true where the individual Justice is not needed for the majority. But where he is, it begs the question: the opinion is *not* a majority opinion except to the extent that it accords with his views. What he writes is not a "gloss," but the least common denominator. To be sure, the separate writing cannot add to what the majority opinion holds, binding the other four Justices to what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation

Because JUSTICE WHITE provided the fifth vote to remand in *Mills*, it is impossible to regard *Mills* as resolving an issue he did not believe to have been before the Court.

III

The constitutional issue conceded in *Mills* is both presented and contested in the present case. North Carolina's capital sentencing statute unambiguously provides that mitigating circumstances must be found by the jury unanimously. The Court finds this scheme constitutionally defective because it prevents individual jurors "from giving effect to evidence that they believe calls for a sentence less than death." *Ante*, at 439 (citing *Eddings*, 455 U. S., at 110, and *Lockett*, 438 U. S., at 604) (internal quotations omitted). This is so because each juror's answers to the ultimately dispositive Issues Three and Four can take account of only those mitigating circumstances found by the jury unanimously under Issue Two. Thus, any juror who concludes that the defendant has proved additional mitigating circumstances is precluded by his colleagues' disagreement from giving that conclusion effect. The Court several times refers to the prospect that one "'holdout' juror" will prevent the other 11 from reaching the decision they wish, *ante*, at 438, but the reader should not be misled: The constitutional principle appealed to is not majority rule but just the opposite. According to the Court, North Carolina's system in which one juror can prevent the others from giving effect to a mitigating circumstance is invalid only because the Constitution *requires*, in the context

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adopted by a necessary member of that majority. If the author of the opinion finds what the "glossator" says inconsistent with his own understanding of the opinion, he may certainly decline, at the outset of the opinion, to show that Justice as joining; and if the "glossator" nonetheless insists upon purporting to join, I suppose the author can explicitly disclaim his company. But I have never heard it asserted that four Justices of the Court have the power to fabricate a majority by binding a fifth to their interpretation of what they say, even though he writes separately to explain his own more narrow understanding.

of the North Carolina statute, a system in which one juror can prevent the others from *denying effect* to a mitigating circumstance. The "'holdout' juror" scenario provides attractive atmosphere, but the alleged constitutional principle upon which the decision rests is that *"each juror* [must] be permitted to consider *and give effect* to mitigating evidence when deciding the ultimate question whether to vote for a sentence of death," *ante,* at 442 (emphasis added), and "may not be foreclosed by one *or more* jurors' failure," *ante,* at 443 (emphasis added), to find that those mitigating facts existed, or that those existing facts were mitigating. Such a scheme, under which (at least where the statute requires the jury's recommendation of death to be unanimous) a single juror's finding regarding the existence of mitigation *must* control, is asserted to be demanded by "the principle established in *Lockett* v. *Ohio,* 438 U. S. 586 (1978), that a sentencer may not be precluded from giving effect to all mitigating evidence." *Ante,* at 438.

With respect, "the principle established in *Lockett*" does not remotely support that conclusion. In *Lockett,* the Court vacated a death sentence imposed under a statute that limited the sentencing judge's consideration of mitigating factors to three statutory circumstances. A plurality of the Court reasoned that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U. S., at 604 (opinion of Burger, C. J.) (emphasis omitted; footnotes omitted). Similarly, in *Eddings,* also relied upon by the Court, we vacated a death sentence because the sentencing judge refused to consider evidence proffered by the defendant of his unhappy upbringing. We reasoned: "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence." 455 U. S., at 113–114 (emphasis in original). Accord, *Penry* v. *Lynaugh*, 492 U. S., at 328 (failure to instruct Texas jury that it could consider and give effect to mitigating evidence beyond the scope of three statutory special issues inconsistent with *Lockett* and *Eddings*); *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987) (trial judge's belief that Florida law prohibited consideration of nonstatutory mitigating circumstances and corresponding instruction to the jury contravened *Lockett*); *Skipper* v. *South Carolina*, 476 U. S. 1 (1986) (trial judge's failure to permit jury to consider evidence of defendant's good behavior in prison inconsistent with *Lockett* and *Eddings*).

The principle established by these cases is that a State may not preclude *the sentencer* from considering and giving effect to evidence of any relevant mitigating circumstance proffered by the defendant. See *Penry*, *supra*, at 319 ("*The sentencer* must . . . be able to consider and give effect to [mitigating] evidence in imposing sentence") (emphasis added); *Hitchcock*, *supra*, at 394 ("*[T]he sentencer* may not refuse to consider or be precluded from considering any relevant mitigating evidence") (internal quotations omitted; citations omitted; emphasis added); *Skipper*, *supra*, at 5 (mitigating "evidence may not be excluded from *the sentencer's* consideration") (emphasis added); *Eddings*, *supra*, at 114 ("*[T]he sentencer* [may not] refuse to consider . . . any relevant mitigating evidence") (emphasis added); *Lockett*, *supra*, at 604 ("Eighth and Fourteenth Amendments require that *the sentencer* . . . not be precluded from considering" mitigating evidence) (emphasis added; footnote omitted). The sentencer in this case was the North Carolina jury, which has not been precluded from considering and giving effect to all mitigating circumstances.

What petitioner complains of here is not a limitation upon *what* the sentencer was allowed to give effect to, but rather a limitation upon the *manner* in which it was allowed to do so—

viz., only unanimously. As the Court observes today, that is a crucial distinction. "There is a simple and logical difference between rules that govern *what* factors the jury must be permitted to consider in making the sentencing decision and rules that govern *how* the State may guide the jury in considering and weighing those factors in reaching a decision." *Saffle* v. *Parks*, *post*, at 490 (emphasis added). In holding that a rule invalidating an antisympathy instruction would be a new rule under *Teague* v. *Lane*, 489 U. S. 288 (1989), we concluded that *Lockett* and *Eddings* "do not speak directly, if at all, to" "*how* [the jury] must consider the mitigating evidence," as opposed to "*what* mitigating evidence the jury must be permitted to consider in making its sentencing decision." *Saffle*, *post*, at 490. Accord, *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion) ("[W]e have never suggested that jury consideration of mitigating evidence must be undirected or unfocused"). In short, *Lockett* and *Eddings* are quite simply irrelevant to the question before us, and cannot be pressed into service by describing them as establishing that "*a* sentencer [by which the reader is invited to understand an individual member of the jury] may not be precluded from giving effect to all mitigating evidence." *Ante*, at 438 (emphasis added).

IV

Nothing in our prior cases, then, supports the rule the Court has announced; and since the Court does not even purport to rely upon constitutional text or traditional practice, nothing remains to support the result. There are, moreover, some affirmative indications in prior cases that what North Carolina has done is constitutional. Those indications are not compelling—for the perverse reason that the less support exists for a constitutional claim, the less likely it is that the claim has been raised or taken seriously before, and hence the less likely that this Court has previously rejected it. If petitioner should seek reversal of his sentence because two jurors were wearing green shirts, it would be impossible to say anything against the claim except that there is nothing to be said *for* it—neither in text, tradition, nor jurisprudence. That is the point I have already made here, and that alone suffices.

With the caution, however, that it is entirely superfluous, I may mention several aspects of our jurisprudence that appear to contradict the Court's result. To begin with, not only have we never before invalidated a jury-unanimity requirement, but we have approved schemes imposing such a requirement in contexts of great importance to the criminal defendant—for example, as a condition to establishing the defense of self-defense in a capital murder case, see *Martin* v. *Ohio*, 480 U. S. 228 (1987); Ohio Rev. Code Ann. §§ 2903.01, 2929.02 (1987); Ohio Rule Crim. Proc. 31(A), as a condition to establishing the defense of extreme emotional disturbance in a second-degree murder case, see *Patterson* v. *New York*, 432 U. S. 197 (1977); N. Y. Crim. Proc. Law § 310.80 (McKinney 1971), and as a condition to establishing the defense of insanity in a second-degree murder case, see *Rivera* v. *Delaware*, 429 U. S. 877 (1976); Del. Super. Ct. Crim. Rule 31(a), Del. Code Ann., vol. 17, p. 227 (1975).[4]

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[4] JUSTICE BLACKMUN finds the analogy to affirmative defenses less than persuasive because he says that "it is not at all clear" that "the jury's failure to agree as to an affirmative defense results in a conviction," "rather than a hung jury." *Ante*, at 450–451. It would be interesting to know the basis for that doubt with respect to the jurisdictions I have cited. Under New York law, for example, the jury's verdict—whether guilty or not guilty—must be unanimous. See N. Y. Crim. Proc. Law § 310.80 (McKinney 1982). When an affirmative defense is raised, "the court must carefully instruct the jury that they must be satisfied of defendant's guilt of the offense beyond a reasonable doubt before they may consider the affirmative defense." Practice Commentary following N. Y. Penal Law § 25.00, p. 77 (McKinney 1987); see *People* v. *Morris*, 68 App. Div. 2d 893, 413 N. Y. S. 2d 757 (1979); 31 N. Y. Jur. 2d, Criminal Law § 188, pp. 335–336 (1983) ("[G]uilt must be established beyond a reasonable doubt before the jury can even consider an affirmative defense"). If the jurors follow their instructions, it would appear that the jury that has considered but not

Of course the Court's holding today—and its underlying thesis that each individual juror must be empowered to "give effect" to his own view—invalidates not just a requirement of *unanimity* for the defendant to benefit from a mitigating factor, but a requirement of *any* number of jurors more than one. Thus it is also in tension with *Leland* v. *Oregon*, 343 U. S. 790 (1952), which upheld, in a capital case, a requirement that the defense of insanity be proved (beyond a reasonable doubt) to the satisfaction of at least 10 of the 12-member jury. Even with respect to proof of the substantive offense, as opposed to an affirmative defense, we have approved verdicts by less than a unanimous jury. See *Apodaca* v. *Oregon*, 406 U. S. 404 (1972) (upholding state statute providing for conviction by 10-to-2 vote). We have, to be sure, found that a criminal verdict by less than all of a six-person jury is unconstitutional—not, however, because of any inherent vice in nonunanimity, but because a 5-to-1 verdict, no less than a 5-to-0 verdict, see *Ballew* v. *Georgia*, 435 U. S. 223 (1978), "presents a . . . threat to preservation of the substance of the jury trial guarantee." *Burch* v. *Louisiana*, 441 U. S. 130, 138 (1979).

The Court discusses briefly one of the above cases *(Patterson)*, in which we said that if a State "chooses to recognize a factor that mitigates the degree of criminality or punishment, . . . the State may assure itself that the fact has been established with reasonable certainty." 432 U. S., at 209. It distinguishes that case, and presumably would distinguish the rest I have cited, as follows: "The Constitution *requires* States to allow consideration of mitigating evidence in capital cases. Any barrier to such consideration must therefore fall." *Ante*, at 442. But surely the Constitution also requires States to allow consideration of all evidence bearing

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unanimously found an affirmative defense must return a verdict of guilty. One wonders what proportion of the jury JUSTICE BLACKMUN believes is necessary to find an affirmative defense (if not all 12) in those States where the law does not explicitly specify a majority.

upon the substantive criminal offense and consideration of all evidence bearing upon affirmative defenses. If, in those contexts, it is not regarded as a "barrier" to such consideration to require unanimity before any single juror's evaluation of the evidence can be "given effect" to the defendant's advantage, I do not understand why a comparable requirement constitutes a "barrier" to consideration of mitigation. Or why, in the latter context, assuring "reasonable certainty" is no longer a legitimate objective.

Likewise incompatible with the Court's theory is the principle of guided discretion that we have previously held to be essential to the validity of capital sentencing. States, we have said, "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the process for imposing a sentence of death.'" *Godfrey* v. *Georgia*, 446 U. S. 420, 428 (1980) (plurality opinion) (footnotes omitted). There is little guidance in a system that requires each individual juror to bring to the ultimate decision his own idiosyncratic notion of what facts are mitigating, untempered by the discipline of group deliberation and agreement. Until today, I would have thought that North Carolina's scheme was a model of guided discretion. The requirement that the jury determine four specific issues operates like a special verdict—a device long recognized as enhancing the reliability and rationality of jury determinations. See, *e. g.*, Sunderland, Verdicts, General and Special, 29 Yale L. J. 253, 261 (1920). Moreover, by enabling the reviewing court to examine the specific findings underlying the verdict it facilitates appellate review, which we have described as "an important additional safeguard against arbitrariness and caprice." *Gregg* v. *Georgia*, 428 U. S., at 198 (opinion of Stewart, Powell, and STEVENS, JJ.). "Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner." *Id.*, at 195. Accord, *Zant* v. *Stephens*, 462 U. S., at 890; *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.).

The Court strikes down this eminently reasonable scheme. The quality of what it substitutes is conveniently evaluated by considering how future North Carolina juries will behave under the Court's own doomsday hypothetical, in which all jurors believe the defendant has proved one mitigating circumstance, but each believes a different one. *Ante*, at 439–440. A jury, of course, is not a collection of individuals who are asked separately about their independent views, but a body designed to deliberate and decide collectively. See *Williams* v. *Florida*, 399 U. S. 78, 100 (1970) (Sixth Amendment requires a jury "large enough to promote group deliberation"); *Ballew* v. *Georgia*, 435 U. S. 223 (1978) (five-person jury too small); *id.*, at 232–234 (opinion of BLACKMUN, J.) (small juries impede group deliberation). But after today's decision, in the hypothetical the Court has posed, it will be quite impossible for North Carolina sentencing juries to "deliberate" on the dispositive questions (Issues Three and Four—whether the aggravating circumstances outweigh the mitigating circumstances, and whether in light of the mitigating circumstances the aggravating circumstances justify death), because no two jurors agree on the identity of the "mitigating circumstances." Each juror must presumably decide in splendid isolation, on the basis of his uniquely determined mitigating circumstance, whether death should be imposed. What was supposed to be jury trial has degenerated into a poll. It seems to me inconceivable that such a system should be—not just tolerated under the Constitution—but constitutionally prescribed.[5]

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[5] JUSTICE BLACKMUN believes that this grotesque distortion of normal jury deliberations cannot be blamed upon the rule the Court today announces, but is rather North Carolina's own fault, because the scheme it has adopted represents "an extraordinary departure from the way in which juries customarily operate." *Ante*, at 449. Typically, he points out, ju-

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In sum, the constitutional prohibition asserted by the petitioner was not decided in *Mills* and is not supported by *Lockett* and *Eddings*. Since nothing else is adduced to support it, there is no basis for believing that it exists. It is, moreover, contrary to the constitutional principles governing jury trial in other contexts, contrary to the principle of guided discretion that launched our modern incursion into the field of capital sentencing, and destructive of sound jury deliberation. When we abandon text and tradition, and in addition do not restrict prior cases to their holdings, knowing and observing the law of the land becomes impossible. State officials sworn to uphold the Constitution we expound rush to comply with one of our newly designed precepts, only to be told that by complying they have violated another one that points in the opposite direction. Compare *Furman* v. *Georgia*, 408 U. S. 238 (1972) (invalidating discretionary death penalty), with *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (invalidating mandatory death penalty enacted in light of *Furman*). I dissent from today's decision, and from the unpredictable jurisprudence of capital sentencing that it represents.

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ries "are . . . called upon to render unanimous verdicts on the ultimate issues of a given case," with "no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Ibid.* This is the sort of argument that causes state legislators to pull their hair. A general verdict is of course the usual practice. *But it is this Court that has pushed the States to special verdicts in the capital sentencing field.* We have intimated that requiring "the sentencing authority . . . to specify the factors it relied upon in reaching its decision" may be necessary to ensure, through "meaningful appellate review [,] that death sentences are not imposed capriciously or in a freakish manner." *Gregg* v. *Georgia*, 428 U. S. 153, 195 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.). Disparaging a practice we have at least encouraged, if not indeed coerced, gives new substance to the charge that we have been administering a "bait and switch" capital sentencing jurisprudence.

LEWIS, COMPTROLLER OF THE STATE OF FLORIDA *v.* CONTINENTAL BANK CORP. ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 87–1955. Argued November 28, 1989—Decided March 5, 1990

Before 1987, the Bank Holding Company Act of 1956 (BHCA) allowed States to prohibit an out-of-state bank holding company from owning an in-state "bank," which was defined to include an institution that both accepted demand deposits and engaged in the commercial lending business. In 1981, appellee, an Illinois bank holding company, applied to Florida to establish and operate an "industrial savings bank" (ISB) in that State, averring that "all deposit relationships" would be insured "to the maximum extent allowed by the Federal Deposit Insurance Corporation" (FDIC). Appellant Lewis, the State Comptroller, refused to process the application on the ground that two state statutes prohibited out-of-state holding companies from operating ISBs in Florida. Appellee then filed a suit claiming that the state statutes violated the Commerce Clause, and the District Court granted summary judgment in its favor, ordering Lewis to process the application. The court subsequently denied without explanation appellee's motion for attorney's fees under 42 U. S. C. § 1988. In 1987, shortly before the Court of Appeals affirmed on the merits and remanded for an explanation of why the attorney's fees claim had been denied, amendments to the BHCA expanded the definition of "bank" to include all banks whose deposits are insured by the FDIC. Lewis then filed a petition for rehearing in the Court of Appeals, arguing that the new legislation mooted the controversy because, since appellee's proposed ISB would have FDIC-insured deposits, the refusal to process the application was authorized by federal law and hence immune from Commerce Clause challenge. The court denied the petition, awarded appellee attorney's fees for the appeal, and remanded for the District Court to calculate the amount of that award and to determine whether an award was appropriate for work done in the District Court.

Held:

1. The case has been rendered moot by the 1987 BHCA amendments. The only evidence in the record of appellee's stake in the case's outcome

is its application to establish and operate an FDIC-insured ISB, which stake was eliminated by the amendments. The application constitutes no evidence that appellee intended to establish an *un*insured bank, since "insured by the FDIC to the maximum extent allowed" envisions FDIC insurance. There is no merit to appellee's argument that its suit nevertheless remains justiciable because its dispute with Florida is "capable of repetition, yet evading review." Since Florida's allegedly unconstitutional action is no longer unconstitutional with respect to insured ISBs, there is no reasonable expectation that appellee will suffer the same wrong again. Moreover, the State's refusal to issue a bank charter is not the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely to evade review. See *Los Angeles* v. *Lyons*, 461 U. S. 95, 109. Pp. 477–482.

2. Appellee's postargument, *ex parte* affidavit averring its interest in opening, and explaining its failure to file an updated application for, an uninsured ISB will not be evaluated by this Court in the first instance. Since, however, the case's mootness is attributable to a change in the governing legal framework, and since appellee may have a residual claim, which understandably was not asserted previously, that it intended to apply for an uninsured ISB not covered by the new framework, the case is remanded for consideration of such materials as the parties may submit to supplement the record. See *Diffenderfer* v. *Central Baptist Church of Miami, Inc.*, 404 U. S. 412, 415. Pp. 482–483.

3. Because the event that mooted the controversy occurred before the Court of Appeals' judgment, appellee was not, at the appeal stage, a "prevailing party" entitled to recover attorney's fees under § 1988. See *Rhodes* v. *Stewart*, 488 U. S. 1, 3–4. Whether appellee can be deemed a "prevailing party" in the District Court, and whether § 1988 fees are available in a Commerce Clause challenge, must be resolved by the courts below in the first instance. P. 483.

827 F. 2d 1517 and 838 F. 2d 457, vacated and remanded.

SCALIA, J., delivered the opinion for a unanimous Court.

Arthur E. Wilmarth, Jr., argued the cause for appellant. With him on the briefs were *Eric J. Taylor*, Assistant Attorney General of Florida, *Charles L. Stutts*, *R. Michael Underwood*, *Albert T. Gimbel*, *J. Thomas Cardwell*, and *Joe A. Walters*.

Andrew L. Gordon argued the cause for appellees. With him on the brief were *Bowman Brown* and *Lee D. Mackson.**

JUSTICE SCALIA delivered the opinion of the Court.

This case involves an Illinois bank holding company's challenge to certain Florida banking statutes that are alleged to violate the Commerce Clause, U. S. Const., Art. 1, §8, cl. 3. We conclude that the case has been rendered moot by 1987 amendments to the Bank Holding Company Act.

I

Under §3(d) of the Bank Holding Company Act of 1956 (BHCA), 70 Stat. 134, as amended, 12 U. S. C. §1842(d), a bank holding company with its principal banking operations in one State may not establish or acquire a bank in another State unless the latter State's statutes specifically authorize it to do so. The BHCA thus effectively permits States to prevent out-of-state holding companies from owning in-state banks. That license for state discrimination applies, however, only if the proposed banking subsidiary is a "bank" as defined in §2(c) of the BHCA, 70 Stat. 133, as amended, 12 U. S. C. §1841(c). Until 1987, a banking institution qualified as a "bank" for purposes of the BHCA only if it both accepted demand deposits and engaged in the business of commercial lending. As amended by the Competitive Equality Amendments of 1987, 101 Stat. 554, the BHCA definition was expanded to include all banks whose deposits are insured by the Federal Deposit Insurance Corporation (FDIC). See 12 U. S. C. §1841(c)(1)(A).

**Benna Ruth Solomon* and *Charles Rothfeld* filed a brief for the National Conference of State Legislatures et al. as *amici curiae* urging reversal.

John L. Warden and *Michael M. Wiseman* filed a brief for the New York Clearing House Association as *amicus curiae* urging affirmance.

Andrew L. Frey, Kenneth S. Geller, Andrew J. Pincus, Daniel R. Barney, Robert Digges, Jr., and *William S. Busker* filed a brief for the American Trucking Associations, Inc., as *amicus curiae.*

On June 29, 1981, appellee Continental Bank Corporation, a bank holding company with its principal place of business in Illinois, filed an application with the Florida Department of Banking and Finance to establish and operate an "industrial savings bank" (ISB) in Florida. According to the application, "'[a]ll deposit relationships'" would be insured "'to the maximum extent allowed by the [FDIC].'" Juris. Statement 1–2.

Appellant Lewis, Comptroller of the State of Florida and head of the Department of Banking and Finance, refused to process the application on the ground that two Florida statutes, Fla. Stat. § 658.29(1) (Supp. 1980) and Fla. Stat. § 664.03 (14) (Supp. 1980), prohibited out-of-state bank holding companies from operating ISBs in Florida. Continental thereupon filed a complaint in the United States District Court for the Northern District of Florida, claiming that the statutes violated the Commerce Clause, U. S. Const., Art. I, § 8, cl. 3, and praying for declaratory and injunctive relief. The District Court granted summary judgment for the plaintiff, holding that the Florida statutes unconstitutionally discriminated against nonresidents, and ordered Lewis to process Continental's application.

In June 1984, after the District Court had entered judgment, the State of Florida amended its statutes to prohibit the chartering of any new ISBs in the State, whether by resident or nonresident enterprises. Fla. Stat. § 664.02(1) (Supp. 1984). Lewis then moved to amend or alter the judgment pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, arguing that the new nondiscriminatory ban had rendered the validity of the challenged statutes moot. The District Court denied the motion, reasoning that the new statute, even if constitutional, did not moot the case because the State's unconstitutional behavior was "capable of repetition, yet evading review." App. 66a. Meanwhile, Continental had moved for an award of attorney's fees under 42 U. S. C. § 1988, arguing that Lewis' enforcement of the statutes had deprived it of its constitutional rights in violation of 42 U. S. C. § 1983. The District Court denied that motion without explanation.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed on the merits issue, though resting its determination that the case was not moot on the different ground that the supervening ban on new ISBs was unconstitutional, since it had the purpose and effect of denying nonresident holding companies access to Florida deposits. The Court of Appeals did not resolve Continental's claim for attorney's fees, but remanded the case to the District Court for an explanation of why that claim had been denied. *Continental Illinois Corp.* v. *Lewis*, 827 F. 2d 1517 (1987).

In August 1987, shortly before the Court of Appeals issued its opinion, there was again a change in the law, this time at the federal level. As part of the Competitive Equality Amendments of 1987, 101 Stat. 554, Congress expanded the BHCA definition of "bank." The new definition, codified at 12 U. S. C. § 1841(c)(1)(A), includes any "insured bank as defined by section 3(h) of the Federal Deposit Insurance Act," which in turn defines "insured bank" as "any bank . . . the deposits of which are insured" by the FDIC. 12 U. S. C. § 1813(h). After this amendment to the BHCA, Lewis filed a petition for rehearing in the Court of Appeals, arguing that the new legislation mooted the controversy because the ISB that Continental proposed to establish would have FDIC-insured deposits and therefore would be a "bank" within the coverage of the BHCA. Such coverage, Lewis argued, would mean that Florida's refusal to permit Continental to establish an ISB, even if discriminatory against interstate commerce, would be authorized by federal law and hence immune from challenge under the Commerce Clause.

The Court of Appeals denied the petition for rehearing in a brief opinion, saying that it did "not agree that the amendments necessarily would make Continental's operation of an ISB in Florida a 'banking' activity in every instance," and that it could not "now guess what the parties will do or not do as a result of the enactment of the August 10, 1987 [BHCA] amendments." 838 F. 2d 457, 458 (CA11 1988). In addition, the court awarded Continental attorney's fees for the appeal, without explaining the basis for the award, and remanded to the District Court for a calculation of a proper award for the appeal as well as a determination whether an award was appropriate for work done in the District Court.

Lewis appealed to this Court, invoking our jurisdiction under 28 U. S. C. § 1254(2) (1982 ed.), now repealed, 102 Stat. 662, 664. We noted probable jurisdiction. 490 U. S. 1097 (1989).

II

Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. *Deakins* v. *Monaghan*, 484 U. S. 193, 199 (1988); *Preiser* v. *Newkirk*, 422 U. S. 395, 401 (1975). To invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision, *Allen* v. *Wright*, 468 U. S. 737, 750–751 (1984); *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 471–473 (1982). Article III denies federal courts the power "to decide questions that cannot affect the rights of litigants in the case before them," *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971), and confines them to resolving "'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Ibid.* (quoting *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 227, 241 (1937)). This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. To sustain our jurisdiction in the present case, it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the

Court of Appeals. *Deakins*, *supra*, at 199; *Steffel* v. *Thompson*, 415 U. S. 452, 459, n. 10 (1974). The parties must continue to have a "'personal stake in the outcome'" of the lawsuit, *Los Angeles* v. *Lyons*, 461 U. S. 95, 101 (1983) (quoting *Baker* v. *Carr*, 369 U. S. 186, 204 (1962)).

On the record before us, the only evidence of Continental's stake in the outcome was its application to establish and operate an ISB. That application, however, pertained to an FDIC-insured institution, specifying that "all deposit relationships" would be insured "to the maximum extent allowed" by the FDIC. Thus, the stake represented by that application was eliminated by the 1987 amendments to the BHCA, which make it clear that no matter how the Commerce Clause issues in this suit are resolved the application can constitutionally be denied. Continental concedes that, under the amended BHCA, an FDIC-insured ISB is a "bank" within the BHCA definition; that Florida is thus authorized by Congress to exclude insured ISBs owned by nonresident holding companies; and that such exclusion (by virtue of its congressional authorization) does not violate the Commerce Clause.

Continental has argued in this Court that the quoted language of the application meant that the ISB would have insurance if insurance was available, and none if none was available. We think not. "Insured by the FDIC to the maximum extent allowed" is quite different from "insured by the FDIC if possible," or "insured by the FDIC to the maximum extent allowed, if any." It envisions FDIC insurance, but instead of specifying a fixed dollar amount of that insurance (the permissible level of which has varied over the years, see, *e. g.*, 94 Stat. 147) specifies the maximum amount allowable from time to time. The application thus constitutes no evidence that Continental had an intent to establish an *un*insured bank. Nor can it be said that the difference between an insured bank and an uninsured bank is inconsequential, so that an expressed intention to open the one displays as well an intention to open the other. Particularly at a time when prospective depositors have been reading news of widespread bank failures, FDIC insurance may well be seen as essential to viability.

Continental contends that it still has a claim for relief because its complaint sought not only the specific relief of ordering Lewis to process the original application, but also a declaration that the Florida statutes were unconstitutional and an injunction against their enforcement in the future. The BHCA amendment, it argues, does not render that requested relief nugatory insofar as it applies to uninsured banks. That may well be so, but the Article III question is not whether the requested relief would be nugatory as to the world at large, but whether *Continental* has a stake in that relief. Even in order to pursue the declaratory and injunctive claims, in other words, Continental must establish that it has a "specific live grievance" against the application of the statutes to uninsured ISBs, *Golden* v. *Zwickler*, 394 U. S. 103, 110 (1969), and not just an "'abstract disagreemen[t]'" over the constitutionality of such application, *Thomas* v. *Union Carbide Agricultural Products Co.*, 473 U. S. 568, 580 (1985) (quoting *Abbott Laboratories, Inc.* v. *Gardner*, 387 U. S. 136, 148 (1967)). As we have discussed, nothing in the record establishes that. Continental informs us that under Florida law it remains free to amend its application so as to seek an uninsured rather than an insured ISB. Perhaps so. But it could also be said that every bank in the country is free to file an application seeking an uninsured Florida ISB. In the one case as in the other, the mere power to seek is not an indication of the intent to do so, and thus does not establish a particularized, concrete stake that would be affected by our judgment. Continental's challenge to the constitutionality of the Florida statutes' application to an uninsured bank that it has neither applied for nor expressed any intent to apply for amounts to a request for advice as to "what the law would be upon a hypothetical state of facts," *Aetna Life Insurance Co.*

v. *Haworth*, 300 U. S., at 241, or with respect to "'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Thomas, supra,* at 580–581, quoting 13A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3532 (1984).

Continental sought to supplement the record in this Court, after argument, by filing the affidavit of an officer of one of its subsidiaries, averring Continental's interest in opening an uninsured Florida ISB, and explaining its failure to file an updated application for such a bank. In the circumstances of the present case, we are not disposed to accept such an affidavit as dispositive, without providing petitioner the opportunity of rebuttal. At the time Continental's challenge to denial of its application for an insured ISB was mooted by the amendments to the BHCA, this litigation had been in progress for almost seven years. An order vacating the judgment on grounds of mootness would deprive Continental of its claim for attorney's fees under 42 U. S. C. § 1988 (assuming, *arguendo*, it would have such a claim), because such fees are available only to a party that "prevails" by winning the relief it seeks, see *Rhodes* v. *Stewart*, 488 U. S. 1 (1988); *Hewitt* v. *Helms*, 482 U. S. 755 (1987). This interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim, see *Diamond* v. *Charles*, 476 U. S. 54, 70–71 (1986). Where on the face of the record it appears that the only concrete interest in the controversy has terminated, reasonable caution is needed to be sure that mooted litigation is not pressed forward, and unnecessary judicial pronouncements on even constitutional issues obtained, solely in order to obtain reimbursement of sunk costs. Reasonable caution includes, we think, not accepting as conclusive the *ex parte* affidavit of the party seeking fees, without providing the other party the opportunity to adduce controverting facts that show the alleged dispute to be "abstract, feigned, or hypothetical." *Sibron* v. *New York*, 392 U. S. 40, 57 (1968).

In any event, whenever possible (and it is possible where the decision under review is that of a federal court) the evaluation of such factual contentions bearing upon Article III jurisdiction should not be made by this Court in the first instance. We therefore decline to accept Continental's supplementation of the record in this Court.

Finally, Continental urges that its suit remains justiciable even if it has no concrete interest in application of the statutes to uninsured banks, because its dispute with Florida is "capable of repetition, yet evading review." This contention is twice wrong. We have permitted suits for prospective relief to go forward despite abatement of the underlying injury only in the "exceptional situations," *Los Angeles* v. *Lyons*, 461 U. S., at 109, where the following two circumstances were simultaneously present: "'(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again.'" *Murphy* v. *Hunt*, 455 U. S. 478, 482 (1982) *(per curiam)* (quoting *Weinstein* v. *Bradford*, 423 U. S. 147, 149 (1975)). Neither of these requirements is satisfied here. Since Florida's allegedly unconstitutional action is no longer unconstitutional with respect to insured ISBs, there is no "reasonable expectation" that Continental will suffer the same wrong again—*unless*, of course, it intends to establish an uninsured ISB, which does not appear on this record. Cf. *California Coastal Comm'n* v. *Granite Rock Co.*, 480 U. S. 572, 578 (1987); *Press-Enterprise Co.* v. *Superior Court of California, Riverside County*, 478 U. S. 1, 6 (1986). Nor is the State's refusal to issue a bank charter the sort of action which, by reason of the inherently short duration of the opportunity for remedy, is likely forever to "evad[e] review." See, *e. g., Burlington Northern R. Co.* v. *Maintenance of Way Employes*, 481 U. S. 429, 436, n. 4 (1987) (injunction on secondary picketing in railroad labor dispute); *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539, 546–547 (1976) (protective order on press coverage of criminal trial). If Continental applies for and is denied a charter for an uninsured bank in Florida, there will be ample time to obtain judicial review of the denial.

III

Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. See, *e. g.*, *Deakins* v. *Monaghan*, 484 U. S., at 204; *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950). However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully. See *Diffenderfer* v. *Central Baptist Church of Miami, Inc.*, 404 U. S. 412, 415 (1972). That is essentially the situation here. The need for Continental to set forth its interest in an uninsured ISB could not have been apparent to anyone until the BHCA amendments were passed. This did not occur until the case had already been argued and submitted in the Court of Appeals. Had Florida's petition for rehearing on the basis of the amendments been granted, Continental could properly be criticized for not supplementing the record at that point. In fact, however, the petition was denied, and we do not think Continental was negligently sleeping on its rights not to take the extraordinary step of seeking to supplement the record at the appellate level merely because the motion was pending.

Accordingly, we vacate the judgment and remand for the Court of Appeals to consider (or to remand for the District Court to consider) such material as may be submitted by both parties in supplementation of the record, bearing upon Continental's concrete interest in the grant of an application for an uninsured Florida ISB. Since the judgment below is vacated on the basis of an event that mooted the controversy before the Court of Appeals' judgment issued, Continental was not, at that stage, a "prevailing party" as it must be to recover fees under § 1988, see *Rhodes* v. *Stewart*, 488 U. S., at 3–4. Whether Continental can be deemed a "prevailing party" in the District Court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty, see, *e. g.*, *Palmer* v. *Chicago*, 806 F. 2d 1316, 1321 (CA7 1986), that has been addressed by neither court below. We decline to resolve that, as well as the related question whether § 1988 fees are available in a Commerce Clause challenge.

The judgment is vacated, and the cause is remanded for such proceedings as are appropriate and consistent with this opinion.

It is so ordered.

SAFFLE, WARDEN, ET AL. *v.* PARKS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 88-1264. Argued November 1, 1989—Decided March 5, 1990

Respondent Parks' state-court capital murder conviction and death sentence became final in 1983. The Federal District Court denied his habeas corpus petition, which was based on the argument that, *inter alia*, an instruction delivered in the penalty phase of his trial, telling the jury to "avoid any influence of sympathy," violated the Eighth Amendment. The Court of Appeals reversed, holding that the instruction was unconstitutional because it in effect told the jury to disregard the mitigating evidence that Parks had presented.

Held: Parks is not entitled to federal habeas relief. The principle he urges is a "new rule" of federal constitutional law that can neither be announced nor applied in a case on collateral review unless it comes within one of two narrow—and here inapplicable—exceptions. *Teague* v. *Lane*, 489 U. S. 288; *Penry* v. *Lynaugh*, 492 U. S. 302. Pp. 487–495.

(a) Parks' contention that the Eighth Amendment requires that the jury be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence constitutes a "new rule" as defined in *Teague* and *Penry*, since a state court considering his claim at the time his conviction became final would not have concluded that it was compelled by existing precedent to adopt it. *Lockett* v. *Ohio*, 438 U. S. 586, and *Eddings* v. *Oklahoma*, 455 U. S. 104, which were both decided before 1983, do not dictate the result urged by Parks, since those cases hold only that the State cannot bar relevant mitigating evidence from being presented and considered during a capital trial's penalty phase, and do not speak to how the State may guide the jury in considering and weighing that evidence. The holding in *Penry*, *supra*, at 315—that the relief sought there did not call for the creation of a new rule—does not compel a similar result here. Nor does the antisympathy instruction run afoul of *Lockett* and *Eddings* on the theory that jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether. At the very least, nothing in those cases prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a reasoned *moral* response, rather than an emotional one based on the whims or caprice of jurors. Similarly, *California* v.

Brown, 479 U. S. 538, 542—which approved an antisympathy instruction that prevented jurors from considering emotional responses not based on the evidence—is of no assistance to Parks. It is doubtful that a constitutional rule requiring that the jury be allowed to consider and give effect to emotions based on mitigating evidence may be inferred from *Brown* or is consistent with the Court's precedents. Moreover, since *Brown* was decided after 1983, Parks can gain its benefit, if any, only by pursuing the untenable argument that *Brown*'s reasoning, if not its result, was dictated by *Lockett* and *Eddings*. Pp. 487–494.

(b) The new rule sought by Parks does not come within either of the two exceptions set forth in *Teague* and *Penry*. The first exception cannot be invoked, since Parks' proposed rule would neither decriminalize a class of private conduct nor prohibit the imposition of capital punishment on a particular class of persons. The second exception is also inapplicable, since Parks' rule has none of the primacy and centrality of the type of "watershed rule of criminal procedure" that the exception contemplates. The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror. Pp. 494–495.

860 F. 2d 1545, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, O'CONNOR, and SCALIA, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, and in all but Part IV of which BLACKMUN and STEVENS, JJ., joined, *post*, p. 495.

Robert A. Nance, Assistant Attorney General of Oklahoma, argued the cause for petitioner. With him on the briefs was *Robert H. Henry*, Attorney General.

Vivian Berger, by appointment of the Court, 490 U. S. 1063, argued the cause and filed a brief for respondent.*

JUSTICE KENNEDY delivered the opinion of the Court.

The issue before us is whether respondent Robyn Leroy Parks, whose conviction and death sentence became final in

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[*]John K. Van de Kamp, Attorney General, *Richard B. Iglehart*, Chief Assistant Attorney General, *Harley D. Mayfield*, Senior Assistant Attorney General, and *Jay M. Bloom*, Deputy Attorney General, filed a brief for the State of California as *amicus curiae*.

1983, is entitled to federal habeas relief. His claim is that an instruction in the penalty phase of his trial, telling the jury to avoid any influence of sympathy, violates the Eighth Amendment. In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), we held that a new rule of constitutional law will not be applied in cases on collateral review unless the rule comes within one of two narrow exceptions. This limitation on the proper exercise of habeas corpus jurisdiction applies to capital and noncapital cases. See *id.*, at 314. We hold that Parks is not entitled to federal habeas relief. The principle he urges is a new rule within the meaning of *Teague* v. *Lane*, 489 U. S. 288 (1989). It is not dictated by our prior cases and, were it to be adopted, it would contravene well-considered precedents. We also hold that the rule petitioner asks us to adopt does not come within either of the two exceptions set forth in *Teague*.

A passing motorist found Abdullah Ibrahim, a native of Bangladesh, dead inside the Oklahoma City gas station where Ibrahim worked. The victim died from a single chest wound inflicted by a .45-caliber pistol. Parks admitted the murder to a friend, and the police obtained tapes of that statement. Parks said that he shot Ibrahim because he was afraid Ibrahim would tell the police that Parks used a stolen credit card to purchase gasoline.

In 1978, a jury found Parks guilty of capital murder. During the sentencing phase of the trial, Parks offered as mitigating evidence the testimony of his father, who described Parks' background and character. Parks' counsel relied upon this testimony in his closing argument, arguing that Parks' youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. He asked the jury to show "kindness" to Parks in consideration of his background.

After instructing the jury that it must consider all of the mitigating circumstances, statutory or nonstatutory, proffered by Parks, and that it could consider any mitigating circumstances that it found from the evidence, the trial court delivered the following instruction:

> "You are the judges of the facts. The importance and worth of the evidence is for you to determine. You must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence. You should discharge your duties as jurors impartially, conscientiously and faithfully under your oaths and return such verdict as the evidence warrants when measured by these Instructions." App. 13.

After finding as an aggravating circumstance that the murder was "committed for the purpose of avoiding or preventing a lawful arrest or prosecution," Okla. Stat., Tit. 21, § 701.12 (1981), the jury sentenced Parks to death.

Parks' conviction and sentence were affirmed on direct appeal by the Oklahoma Court of Criminal Appeals, *Parks* v. *State*, 651 P. 2d 686 (1982), and we denied certiorari, 459 U. S. 1155 (1983). After seeking postconviction relief in the state courts, Parks filed a petition for a writ of habeas corpus in Federal District Court arguing, *inter alia*, that the antisympathy instruction delivered in the penalty phase violated the Eighth Amendment because it in effect told the jury to disregard the mitigating evidence that Parks had presented. The District Court denied relief, and a divided panel of the Court of Appeals for the Tenth Circuit affirmed. *Parks* v. *Brown*, 840 F. 2d 1496 (1988). On rehearing, the Tenth Circuit sitting en banc reversed, holding that the antisympathy instruction was unconstitutional for the reasons advanced by Parks. *Parks* v. *Brown*, 860 F. 2d 1545 (1988). We granted certiorari, 490 U. S. 1034 (1989), and now reverse.

Parks petitions the federal courts for a writ of habeas corpus. As he is before us on collateral review, we must first determine whether the relief sought would create a new rule under our holdings in *Teague* v. *Lane*, *supra*, at 299–301, and *Penry*, *supra*, at 313. If so, we will neither announce nor apply the new rule sought by Parks unless it would fall into one of two narrow exceptions. *Teague*, *supra*, at 307; *Penry*, *supra*, at 329.

In *Teague*, we defined a new rule as a rule that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "*dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, at 301 (plurality opinion) (emphasis in original). The explicit overruling of an earlier holding no doubt creates a new rule; it is more difficult, however, to determine whether we announce a new rule when a decision extends the reasoning of our prior cases. As we recognized in *Butler* v. *McKellar*, *ante*, at 412–414, the question must be answered by reference to the underlying purposes of the habeas writ. Foremost among these is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings. See *ante*, at 413. "'[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards. In order to perform this deterrence function, . . . the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place.'" *Teague*, *supra*, at 306 (quoting *Desist* v. *United States*, 394 U. S. 244, 262–263 (1969) (Harlan, J., dissenting)). See also *Solem* v. *Stumes*, 465 U. S. 638, 653 (1984) (Powell, J., concurring in judgment). "The 'new rule' principle therefore validates reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions." *Butler*, *ante*, at 414. Under this functional view of what constitutes a new rule, our task is to determine whether a state court considering Parks' claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule Parks seeks was required by the Constitution.

Parks contends that the result he seeks does not involve the creation of a new rule. Relying upon our decisions in

Lockett v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), both decided before his conviction became final in 1983, and our decision in *California* v. *Brown*, 479 U. S. 538 (1987), decided after his conviction became final, Parks argues that the Eighth Amendment, as interpreted in 1983, required, and still requires, that jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence. We disagree and conclude that adoption of this principle would create a new rule as defined in *Teague* and *Penry*.

In *Lockett*, a plurality of the Court decided that an Ohio death penalty statute that limited the jury's consideration to specified mitigating circumstances violated the constitutional requirement of individualized sentencing in capital cases. See 438 U. S., at 605. The plurality based its conclusion on the view that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original; footnotes omitted).

In *Eddings*, the view adopted by the *Lockett* plurality ripened into a holding of the Court. We ruled that a sentencing judge's refusal, as a matter of law, to consider mitigating evidence presented by a capital defendant concerning his family history and upbringing was constitutional error. Relying on the plurality opinion in *Lockett*, the Court reasoned:

> "Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from

their consideration." *Eddings, supra,* at 113–115 (emphasis in original).

Review of our decisions in *Lockett* and *Eddings* convinces us that the two cases do not dictate the result urged by Parks. There is no dispute as to the precise holding in each of the two cases: that the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial. These two cases place clear limits on the ability of the State to define the factual bases upon which the capital sentencing decision must be made. Indeed, that is how we have interpreted these decisions in later cases. See *Hitchcock* v. *Dugger,* 481 U. S. 393, 398–399 (1987) (instruction to advisory jury not to consider nonstatutory mitigating circumstances, and refusal by sentencing judge to consider the same); *Skipper* v. *South Carolina,* 476 U. S. 1, 4–5 (1986) (exclusion of evidence regarding defendant's postoffense conduct).

Lockett and *Eddings* do not speak directly, if at all, to the issue presented here: whether the State may instruct the sentencer to render its decision on the evidence without sympathy. Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence. There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision. We thus cannot say that the large majority of federal and state courts that have rejected challenges to antisympathy instructions similar to that given at Parks' trial have been unreasonable in concluding that the instructions do not violate the rule of *Lockett* and *Eddings.* See *Byrne* v. *Butler,* 847 F. 2d 1135, 1138–1140 (CA5 1988); *People* v. *Emerson,* 122 Ill. 2d 411, 442–443, 522 N. E. 2d 1109, 1122 (1987), cert. denied, 488 U. S. 900 (1988); *State* v. *Ramseur,* 106 N. J. 123, 295–

299, 524 A. 2d 188, 275–277 (1987); *State* v. *Steffen*, 31 Ohio St. 3d 111, 125, 509 N. E. 2d 383, 396 (1987), cert. denied, 485 U. S. 916 (1988); *State* v. *Owens*, 293 S. C. 161, 169, 359 S. E. 2d 275, 279, cert. denied, 484 U. S. 982 (1987); *State* v. *Porterfield*, 746 S. W. 2d 441, 450–451 (Tenn.), cert. denied, 486 U. S. 1017 (1988). Even were we to agree with Parks' assertion that our decisions in *Lockett* and *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that Parks seeks. See *Butler, ante*, at 414–415.

Parks contends that our decision in *Penry* that the relief sought there did not call for the creation of a new rule compels a similar result in this case. We disagree. In *Penry*, we held that resolution of a claim that the Texas death penalty scheme prevented the jury from considering and giving effect to certain types of mitigating evidence did not involve the creation of a new rule under *Teague*. See *Penry*, 492 U. S., at 315. To the extent that Penry's claim was that the Texas system prevented the jury from giving any mitigating effect to the evidence of his mental retardation and abuse in childhood, the decision that the claim did not require the creation of a new rule is not surprising. *Lockett* and *Eddings* command that the State must allow the jury to give effect to mitigating evidence in making the sentencing decision; Penry's contention was that Texas barred the jury from so acting. Here, by contrast, there is no contention that the State altogether prevented Parks' jury from considering, weighing, and giving effect to all of the mitigating evidence that Parks put before them; rather, Parks' contention is that the State has unconstitutionally limited the manner in which his mitigating evidence may be considered. As we have concluded above, the former contention would come under the rule of *Lockett* and *Eddings;* the latter does not.

Penry's claim, moreover, did not ask us to apply the reasoning of *Lockett* and *Eddings* so much as it required us to apply our decision in *Jurek* v. *Texas*, 428 U. S. 262 (1976).

Penry interpreted *Jurek* as holding that the Texas death penalty statute is constitutional so long as it is interpreted by the Texas courts to permit the jury to consider mitigating circumstances proffered by the defendant. See *Penry, supra,* at 316. Having thus construed *Jurek,* we concluded that resolution of Penry's claim that "those assurances were not fulfilled *in his particular case,*" 492 U. S., at 318 (emphasis in original), did not involve the creation of a new rule:

> "In our view, the relief Penry seeks does not 'impos[e] a new obligation' on the State of Texas. Rather, Penry simply asks the State to fulfill the assurance upon which *Jurek* was based: namely, that the special issues would be interpreted broadly enough to permit the sentencer to consider all of the relevant mitigating evidence a defendant might present in imposing sentence." *Id.,* at 315 (citations omitted).

The *Penry* Court's conclusion that *Lockett* and *Eddings* dictated the rule sought by Penry, see 492 U. S., at 318–319, must be understood in terms of the Court's ruling in *Jurek,* and its application in later cases. We did not view *Lockett* and *Eddings* as creating a rule different from that relied upon in *Jurek;* rather, we indicated that *Lockett* and *Eddings* reaffirmed the reasoning in *Jurek,* see 492 U. S., at 317–319, and confirmed the necessity of its application to Penry's claim.

We also reject Parks' contention that the antisympathy instruction runs afoul of *Lockett* and *Eddings* because jurors who react sympathetically to mitigating evidence may interpret the instruction as barring them from considering that evidence altogether. This argument misapprehends the distinction between allowing the jury to consider mitigating evidence and guiding their consideration. It is no doubt constitutionally permissible, if not constitutionally required, see *Gregg* v. *Georgia,* 428 U. S. 153, 189–195 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.), for the State to insist that "the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence." *California* v. *Brown*, 479 U. S., at 545 (O'CONNOR, J., concurring). Whether a juror feels sympathy for a capital defendant is more likely to depend on that juror's own emotions than on the actual evidence regarding the crime and the defendant. It would be very difficult to reconcile a rule allowing the fate of a defendant to turn on the vagaries of particular jurors' emotional sensitivities with our longstanding recognition that, above all, capital sentencing must be reliable, accurate, and nonarbitrary. See *Gregg*, *supra*, at 189–195; *Proffitt* v. *Florida*, 428 U. S. 242, 252–253 (1976) (opinion of Stewart, Powell, and STEVENS, JJ.); *Jurek* v. *Texas*, *supra*, at 271–272 (same); *Woodson* v. *North Carolina*, 428 U. S. 280, 303–305 (1976) (plurality opinion); *Roberts* v. *Louisiana*, 428 U. S. 325, 333–335 (1976) (plurality opinion). At the very least, nothing in *Lockett* and *Eddings* prevents the State from attempting to ensure reliability and nonarbitrariness by requiring that the jury consider and give effect to the defendant's mitigating evidence in the form of a "reasoned *moral* response," *Brown*, 479 U. S., at 545 (emphasis in original), rather than an emotional one. The State must not cut off full and fair consideration of mitigating evidence; but it need not grant the jury the choice to make the sentencing decision according to its own whims or caprice. See *id.*, at 541–543.

Given the above discussion, it is obvious that our decision in *California* v. *Brown* is of no assistance to Parks. In *Brown*, we held that an instruction telling the jury not to be "swayed by 'mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling'" during the sentencing phase did not violate the Eighth Amendment. See *id.*, at 542. We reasoned that a reasonable juror would interpret the instruction to ignore mere sympathy "as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence," and that it was not unconstitutional for a State to "prohibi[t] juries from basing their sentencing decisions on factors not presented at the trial." *Id.*, at 542–543. Although we approved of the use of the antisympathy instruction given in *Brown*, Parks attempts to transform our reasoning in that case into a rule that the instruction given in his case violates the Eighth Amendment.

Parks' argument relies upon a negative inference: because we concluded in *Brown* that it was permissible under the Constitution to prevent the jury from considering emotions not based upon the evidence, it follows that the Constitution requires that the jury be allowed to consider and give effect to emotions that are based upon mitigating evidence. For the reasons discussed above, see *supra*, at 488–491, we doubt that this inference follows from *Brown* or is consistent with our precedents. The same doubts are shared by the clear majority of federal and state courts that have passed upon the constitutionality of antisympathy instructions after *Brown*. See *supra*, at 490–491. The fact remains, however, that even if we accept Parks' arguments, *Brown* itself was decided nearly four years after Parks' conviction became final. In order to gain the benefit, if any, of *Brown*, Parks must establish that the decision in *Brown* did not create a new rule. To do so, Parks must contend that *Lockett* and *Eddings* dictated our reasoning, albeit perhaps not the result, in *Brown*. Our discussion above makes it evident that they do not.

Having decided that the relief Parks seeks would necessitate the creation of a new rule, we must determine whether the rule would come within either of the two exceptions to the general principle that new rules will not be applied on collateral review. The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe, see *Teague*, 489 U. S., at 311, or addresses a "substantive categorical guarante[e] accorded by the Constitution," such as a rule "prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U. S., at 329, 330. Parks cannot invoke this exception. The rule sought by Parks would neither decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons. See *Butler*, *ante*, at 415; cf. *Penry*, *supra*, at 329–330.

The second exception is for "watershed rules of criminal procedure" implicating the fundamental fairness and accuracy of the criminal proceeding. See *Teague*, *supra*, at 311 (plurality opinion); *Butler*, *ante*, at 416. This exception is also inapplicable here. Although the precise contours of this exception may be difficult to discern, we have usually cited *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), holding that a defendant has the right to be represented by counsel in all criminal trials for serious offenses, to illustrate the type of rule coming within the exception. See, *e. g.*, *Teague*, *supra*, at 311–312 (plurality opinion); *Stumes*, 465 U. S., at 653–654, and n. 4 (Powell, J., concurring in judgment). Whatever one may think of the importance of respondent's proposed rule, it has none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception. The objectives of fairness and accuracy are more likely to be threatened than promoted by a rule allowing the sentence to turn not on whether the defendant, in the eyes of the community, is morally deserving of the death sentence, but on whether the defendant can strike an emotional chord in a juror.

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, and with whom JUSTICE BLACKMUN and JUSTICE STEVENS join except as to Part IV, dissenting.

Respondent Robyn Parks was sentenced to death for the murder of a gas station attendant. After his conviction became final in 1983, respondent brought a petition for writ of habeas corpus under 28 U. S. C. § 2254 (1982 ed.) challenging his conviction and death sentence. He alleged, *inter alia*, that an instruction given at the sentencing phase of his trial that told the jury to avoid "any influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence," App. 13, deprived him of an individualized sentencing determination because a reasonable juror could have understood the instruction to bar consideration of relevant mitigating evidence. The Tenth Circuit, sitting en banc, agreed and vacated respondent's death sentence. *Parks* v. *Brown*, 860 F. 2d 1545 (1988). Today, the Court holds that respondent is not entitled to relief because his claim would require the application of a "new rule" that may not be applied retroactively on collateral review.[1] The Court displays undue eagerness to apply the new standard for retroactivity announced in *Butler* v. *McKellar*, *ante*, p. 407, at the expense of thoughtful legal analysis. I cannot countenance such carelessness when a life is at stake. I dissent.

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[1] The Court of Appeals for the Tenth Circuit granted respondent relief before we decided *Teague* v. *Lane*, 489 U. S. 288 (1989). Although the case was briefed and argued after *Teague*, neither of the parties nor any *amicus* briefed the retroactivity issue. See also Tr. of Oral Arg. 11 ("Well you really haven't come here prepared to argue the *Teague* point and it's probably not fair to press you on it"). In such circumstances, I question the propriety of the Court's addressing the retroactivity issue in the first instance. Cf. *Teague*, *supra*, at 300 (*amicus* briefed issue). The wiser course would be to vacate the Tenth Circuit's decision and remand for reconsideration in light of *Teague* and the novel standard adopted in *Butler* v. *McKellar*, *ante*, p. 407. See *Zant* v. *Moore*, 489 U. S. 836 (1989) (remanding case after oral argument for reconsideration in light of *Teague*); see *ibid.* (BRENNAN, J., concurring) (appellate court should consider in first instance whether State waived any claim relating to retroactivity). The Court's application of the *new* doctrine of retroactivity adopted in *Teague* to bar relief on a claim that was litigated prior to that decision is contrary to basic fairness. See *Butler*, *ante*, at 422, n. 4 (BRENNAN, J., dissenting).

I

In *Teague* v. *Lane*, 489 U. S. 288 (1989), the Court dramatically altered retroactivity doctrine as it applies to defendants challenging their confinement by the State through the collateral remedy of habeas corpus. The Court held that a habeas petitioner may not obtain relief from an unconstitutional conviction or sentence if his claim would require the recognition of a "new rule" of criminal procedure. *Id.*, at 310 (plurality opinion); *id.*, at 320 (STEVENS, J., joined by BLACKMUN, J., concurring in part and concurring in judgment). Today, in *Butler* v. *McKellar*, *ante*, at 415, the Court defines a "new rule" as one that was "susceptible to debate among reasonable minds" under law prevailing at the time the habeas petitioner's conviction became final. As I argued in my dissent in *Butler*, the Court's novel "reasonableness" review of state court convictions is incompatible with the fundamental purposes of habeas corpus. See *Butler*, *ante*, at 424–430.

The Court's decisions in the instant case and in *Butler* leave no doubt that the Court has limited drastically the scope of habeas corpus relief through the application of a virtually all-encompassing definition of "new rule." In this case, the Court concludes that respondent seeks a "new rule" because it determines that the few lower courts that have rejected similar challenges to an antisympathy instruction were not "unreasonable" for doing so. *Ante*, at 490 ("We thus cannot say that the large majority of federal and state courts that have rejected challenges to antisympathy instructions similar to that given at Park's trial have been unreasonable").[2] The majority's conclusion, however, is based on a fundamental misreading of *Lockett* v. *Ohio*, 438 U. S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989).

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[2] As in *Butler*, the majority looks to decisions from other courts to discern the meaning of our precedents. See *Butler*, *ante*, at 412–415 (*Arizona* v. *Roberson*, 486 U. S. 675 (1988), not "dictated" by *Edwards* v. *Arizona*, 451 U. S. 477 (1981), because of Federal Circuit and state-court split). The mere recitation of lower court cases does little to resolve the question, however, because ultimately it is this Court's responsibility to clarify the scope of its own holdings. In addition, the majority omits any

A

Most of the majority opinion addresses the retroactivity of a claim not even raised by respondent. The majority mischaracterizes respondent's claim as one demanding that "jurors be allowed to base the sentencing decision upon the sympathy they feel for the defendant after hearing his mitigating evidence," *ante*, at 489, and holds that claim barred by *Teague*. See *ante*, at 488–494. But as counsel for respondent argued before this Court:

> "Mr. Parks asserts no constitutional right to a sympathetic or emotional jury. What he does assert under Woodson, Lockett, Eddings and their progeny is the entirely familiar claim upheld consistently by this Court of a right to a sentencer who has not been precluded from considering as a mitigating factor any aspect of a defendant's background, character or record in addition to the circumstances of his offense that he proffers as a basis for a sentence less than death." Tr. of Oral Arg. 19–20.

Respondent concedes the State's contention that a decision to impose the death penalty must reflect a "reasoned moral response" to the defendant's culpability. See, *e. g.*, Brief for Respondent 9. What he argues is that his jury could have *interpreted* the antisympathy instruction as barring consid-

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reference to state-court decisions holding that an antisympathy instruction violated the Eighth Amendment. See, *e. g.*, *People* v. *Lanphear*, 36 Cal. 3d 163, 165–166, 680 P. 2d 1081, 1082–1083 (1984); *Legare* v. *State*, 250 Ga. 875, 877–878, 302 S. E. 2d 351, 353–354 (1983). The Court must do more than simply cite cases rejecting a similar claim to support its conclusion that a state-court decision was "reasonable." See *Butler*, *ante*, at 420–421 (BRENNAN, J., dissenting).

eration of mitigating evidence. More specifically, he claims that because much of the mitigating evidence relevant to his culpability also evoked sympathy, a juror who reacted sympathetically to the evidence would have believed that he was not entitled to consider that evidence *at all*—not even for its "moral" weight.[3] See *id.*, at 10 ("[A]n antisympathy charge by the court, exploited by the prosecutor's remarks, erected a barrier to full consideration of mitigating proof about [respondent's] background. Since these circumstances compromised respondent's chance to obtain a reasoned moral response from the jurors who held his life in the balance, his sentence is too unreliable to stand"). Respondent's actual claim, therefore, alleges nothing more than a violation of the rule recognized in *Lockett*, *supra*, and *Eddings*, *supra*, that a jury may not be prohibited from considering and giving effect to all relevant mitigating evidence when deciding whether to impose the death penalty.

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[3] As JUSTICE O'CONNOR has explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California* v. *Brown*, 479 U. S. 538, 545 (1987) (concurring opinion); see also *Penry* v. *Lynaugh*, 492 U. S. 302, 322 (1989) ("Because Penry was mentally retarded . . . and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, [a] juror could . . . conclude that Penry was less morally 'culpable than defendants who have no such excuse'"). Yet the fact that the evidence is relevant to the jury's moral judgment about the defendant's actions does not rule out the possibility that the evidence may also evoke sympathy in the jurors. See *California* v. *Brown*, *supra*, at 548 (BRENNAN, J., dissenting) ("In forbidding the sentencer to take sympathy into account, this language on its face precludes precisely the response that a defendant's evidence of character and background is designed to elicit, thus effectively negating the intended effect of the Court's requirement that all mitigating evidence be considered"). JUSTICE O'CONNOR's concurrence in *California* v. *Brown*, *supra*, implicitly recognized this possibility. See *id.*, at 545–546 ("[O]ne difficulty with attempts to remove emotion from capital sentencing . . . is that juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored").

It was on this claim that the Tenth Circuit granted respondent habeas corpus relief. 860 F. 2d, at 1556. The court reasoned as follows:

> "'Mercy,' 'humane' treatment, 'compassion,' and consideration of the unique 'humanity' of the defendant, which have all been affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or *are sufficiently intertwined with sympathy* that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. . . .
>
> Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, 'mercy,' 'humane' treatment, 'compassion' and a full 'individualized' consideration of the 'humanity' of the defendant and his 'character.'" *Ibid.* (emphasis added).

In holding that the antisympathy instruction "undermined the jury's ability to consider fully [respondent's] mitigating evidence," the Tenth Circuit was careful to distinguish the claim at issue from the distorted version of respondent's claim that the Court revives today:

> "That argument misconstrues the issue. The issue is not whether unbridled sympathy itself is a proper mitigating factor. Rather, the issue is whether an *absolute* anti-sympathy instruction presents an impermissible danger of interfering with the jury's consideration of proper mitigating evidence. We hold that it does. The Supreme Court has made it clear that such a risk is 'unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.'" *Id.*, at 1557 (quoting *Lockett, supra,* at 605) (emphasis in original).

B

Under *Teague*, respondent's claim must be decided according to the "prevailing law" at the time his conviction became final in 1983 unless his claim falls within one of the two exceptions to the general nonretroactivity presumption. See *Teague*, 489 U. S., at 311. By 1983, this Court had unequivocally held that a sentencer may "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U. S., at 604; see also *Eddings*, 455 U. S., at 113–114 ("Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence"); *id.*, at 115, n. 10 (when state law allows defendant to present any relevant mitigating evidence, "*Lockett* requires the sentencer to listen"). Despite the fact that respondent's conviction was final after both *Lockett* and *Eddings* were decided, the Court today holds that respondent is not entitled to habeas corpus relief because his claim requires the application of a "new rule" of criminal procedure. The majority states that although *Lockett* and *Eddings* may "inform, or even control or govern" such a claim, they do not "*compel*" the rule Parks seeks. *Ante*, at 491. The Court reasons that *Lockett* and *Eddings* answered only the question "*what* mitigating evidence the jury must be permitted to consider in making the sentencing decision" and not "*how* it must consider the mitigating evidence." *Ante*, at 490 (emphasis in original); see *ibid.* ("There is a simple and logical difference between rules that govern what factors the jury must be permitted to consider . . . and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision").

Respondent does not, however, raise a claim challenging *how* the jury considered mitigating evidence. As explained above, he argues that his jury could have believed it could not consider his mitigating evidence's bearing on moral culpability *at all.* Thus, his claim clearly falls within the the holdings of *Lockett* and *Eddings* even under the majority's reading of those cases. The *real* question in this case is whether the rule of *Lockett* and *Eddings* was violated. Resolution of respondent's claim involves only the otherwise familiar inquiry into the sufficiency of the jury instructions, not the recognition of a new principle of law. See, *e. g., Hitchcock* v. *Dugger*, 481 U. S. 393, 397 (1987); *California* v. *Brown*, 479 U. S. 538 (1987). The Court's conclusion that respondent seeks a "new rule" when he claims that the jury was "prevent[ed] . . . from giving independent mitigating weight to aspects of [his] character and record and to circumstances of the offense proferred in mitigation," *Lockett, supra,* at 605, is disingenuous.

Moreover, the majority's limited reading of *Lockett* and *Eddings* was rejected last Term in *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). In that case, we held that *Teague* did not bar a habeas petitioner from raising the claim that the Texas death penalty statute deprived him of an individualized sentencing determination by limiting the *effect* the jury could give to relevant mitigating evidence. 492 U. S., at 318. We explained:

> "[I]t was clear from *Lockett* and *Eddings*, that a State could not, consistent with the Eighth and Fourteenth Amendments, prevent the sentencer from considering and giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigate against imposing the death penalty." *Ibid.*

Penry argued that although a Texas jury was able to give *some* effect to the evidence of mental retardation, the evidence "ha[d] relevance to his moral culpability beyond the scope of the special issues, and . . . the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." *Penry*, *supra*, at 322.[4] In sustaining Penry's challenge, we expressly rejected the argument that although the State may not bar "consideration" of all relevant mitigating evidence, it may channel the "effect" the sentencer gives the evidence. We stated that "'the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration' in imposing sentence." 492 U. S., at 321 (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 185 (1988) (O'CONNOR, J., concurring)).[5] See also *Penry*, *supra*, at 327

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[4] The majority's contention that Penry's "claim was that the Texas system prevented the jury from giving *any* mitigating effect to the evidence of his mental retardation," *ante*, at 491 (emphasis added), is simply incorrect. *Penry*, 492 U. S., at 318. In addition, the majority's effort to premise *Penry* solely on *Jurek* v. *Texas*, 428 U. S. 262 (1976), rather than on *Lockett* and *Eddings* as well, is unavailing. *Jurek* dictated the result in *Penry* because *Jurek* held that a State may not limit the jury's ability to consider and give effect to mitigating evidence. See *Penry*, *supra*, at 318–319 ("The rule Penry seeks—that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed—is not a 'new rule' under *Teague* because it is dictated by *Eddings* and *Lockett*. Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not 'impos[e] a new obligation' on the State of Texas") (quoting *Teague*, 489 U. S., at 301).

[5] See also *Franklin* v. *Lynaugh*, 487 U. S., at 193 (STEVENS, J., dissenting) ("There is no constitutionally meaningful distinction between allowing the jury to hear all the evidence the defendant would like to introduce and then telling the jury to consider that evidence only to the extent that it is probative of one of the enumerated mitigating circumstances, which we held unconstitutional in both *Lockett* and *Hitchcock* [v. *Dugger*, 481 U. S. 393 (1987)], and allowing the jury to hear whatever evidence the defendant would like to introduce and then telling the jury to consider that evidence only to the extent that it is probative of [one of the Texas special issues]").

("'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence'") (quoting *McCleskey* v. *Kemp*, 481 U. S. 279, 304 (1987)).

The majority struggles mightily to distinguish rules that govern a jury's ability to "consider," "weigh," and "give effect to" mitigating evidence from rules relating to the "*manner* in which [the] mitigating evidence can be considered." *Ante*, at 491 (emphasis added). This distinction is meaningless for a rule that limits the *manner* in which the jury considers mitigating evidence is unconstitutional if it limits the jury's ability to consider and give effect to that evidence. But under the majority's approach, a law requiring the jury to discount the weight of all, or of certain, mitigating factors would be consistent with *Lockett* so long as the majority could describe the statute as relating to the "manner" in which the jury considers the evidence despite such a statute's obvious preclusive effect. Cf. *McKoy* v. *North Carolina*, *ante*, at 465–466 (SCALIA, J., dissenting) (requirement that jury unanimously agree that mitigating circumstance exists is not a restriction on the jury's ability to give effect to mitigating evidence, but only on the "*manner* in which it was allowed to do so—viz., only unanimously") (citing *ante*, at 490).

Indeed, the majority's language is strangely reminiscent of the argument trumpeted by JUSTICE SCALIA in *Penry*. JUSTICE SCALIA, writing for four Members of the Court, argued that "it could not be clearer that *Jurek* adopted the constitutional rule that the instructions had to render all mitigating circumstances relevant to the jury's verdict, but that the precise manner of their relevance—the precise *effect* of their consideration—could be channeled by law." *Penry*, *supra*, at 355 (opinion concurring in part and dissenting in part). The Court correctly rejected that position in *Penry*, and its failure to do so today creates considerable ambiguity about which *Lockett* claims a federal court may hereafter consider on habeas corpus review.

C

Because the majority concludes that the claim respondent presses would constitute a "new rule," it must proceed to consider whether the claim fits within the second exception to the *Teague* doctrine of nonretroactivity.[6] A plurality of the Court in *Teague* concluded that only those new rules that amount to "bedrock procedural" rules "without which the likelihood of an accurate conviction is seriously diminished" should be applied retroactively. *Teague*, 489 U. S., at 313. Today, a majority of the Court adopts this crabbed construction of the second exception and holds that the exception is limited to "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Ante*, at 495 (quoting *Teague*, *supra*, at 311); see also *Butler*, *ante*, at 416. Beyond such generalities, the majority offers no guidance despite its concession that the "precise contours of this exception may be difficult to discern." *Ante*, at 495.

The determination with which the Court refuses to apply this exception to a capital sentencing error is most disturbing and is remarkably insensitive to the fundamental premise upon which our Eighth Amendment jurisprudence is built. This Court has consistently "recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983). If the irrevocable nature of the death penalty is not sufficient to counsel against application of Justice Harlan's doctrine of limited retroactivity for collateral review altogether,[7] it should at least inform the determination of the proper scope of the second *Teague* exception in capital cases.[8] Moreover, the majority's insistence that a rule must enhance the accuracy of the *factfinding process* in order to fit within the second exception is difficult to justify in the context of capital sentencing. The decision whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding. See *Teague*, *supra*, at 321 (STEVENS, J., concurring in part and concurring in judgment) ("[A] touchstone of factual innocence would provide little guidance in . . . cases, such as those challenging the constitutionality of capital sentencing hearings"). Cf. *Smith* v. *Murray*, 477 U. S. 527, 537 (1986). Thus, the scope of the exception should be tailored to the unique nature of the sentencing decision.

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[6] The first exception permits the retroactive application of a "new rule" that places primary conduct beyond the power of the State to punish. *Teague*, *supra*, at 311. This exception is not relevant here.

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[7] But see *Teague*, 489 U. S., at 321, n. 3 (STEVENS, J., concurring in part and concurring in judgment) (explaining that one of the main reasons for limited retroactivity on habeas—promoting rehabilitation—is "wholly inapplicable" in capital cases) (citing *Mackey* v. *United States*, 401 U. S. 667, 690–691 (1971)).

[8] In *Penry*, the Court refined the scope of the first *Teague* exception in light of the unique nature of the death penalty. "Although *Teague* read [the first] exception as focusing solely on new rules according constitutional protection to an actor's primary conduct, . . . [i]n our view, a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all." *Penry*, 492 U. S., at 329–330. The scope of the second exception also should reflect the unique consequences of errors at the sentencing phase of a capital trial.

In addition, the plurality in *Teague* implied that the scope of the second exception was narrow because most fundamental rules of procedure have already been established. The Court today apparently rests its cursory treatment of this issue on that same assumption. Regardless of the validity of that premise with respect to rules pertaining to the guilt phase, that understanding is unsupportable when dealing with issues in the capital sentencing context. "In capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases." *Ake* v. *Oklahoma*, 470 U. S. 68, 87 (1985) (Burger, C. J., concurring in judgment).

The foremost concern of the Eighth Amendment is that the death sentence not be imposed in an arbitrary and capricious manner. See, *e. g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 188 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). To comply with this command, a State must narrow the class of defendants eligible for the death penalty and must also ensure that the decision to impose the death penalty is individualized. See *California* v. *Brown*, 479 U. S., at 541. The right to an individualized sentencing determination is perhaps the most fundamental right recognized at the capital sentencing hearing. See *Woodson* v. *North Carolina*, 428 U. S. 280, 304 (1976) (plurality opinion) ("[T]he fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death") (citation omitted). "The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence." *Lockett*, 438 U. S., at 605 (plurality opinion); see *Blystone* v. *Pennsylvania*, *ante*, at 307 ("The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"). Rules ensuring the jury's ability to consider mitigating evidence guarantee that the jury acts with full information when formulating a moral judgment about the defendant's conduct. Because such rules are integral to the proper functioning of the capital sentencing hearing, they must apply retroactively under the second *Teague* exception. Thus, even if respondent's claim constitutes a "new rule," it must fall within the second exception. I fear that the majority's failure to provide any principled analysis explaining why the second *Teague* exception does not apply in this case reflects the Court's growing displeasure with the litigation of capital cases on collateral review.

II

For the same reasons that *Lockett* and *Eddings* compel the conclusion that respondent does not seek a "new rule" under *Teague*, these cases also compel the conclusion that respondent was denied an individualized sentencing determination as required by the Eighth Amendment. As JUSTICE O'CONNOR has recognized, "one difficulty with attempts to remove emotion from capital sentencing through [antisympathy] instructions . . . is that juries may be misled into believing that mitigating evidence about a defendant's background or character also must be ignored." *California* v. *Brown*, 479 U. S., at 545–546 (concurring opinion) (citing *id.*, at 555 (BRENNAN, J., dissenting)). That is exactly what happened in this case: in all likelihood the jury interpreted the antisympathy instruction as a command to ignore the mitigating evidence.

When reviewing the validity of particular jury instructions, the Court has consistently held that "[t]he question . . . is not what [this Court] declares the meaning of the charge to be, but rather what a reasonable juror could have understood the charge as meaning." *Francis* v. *Franklin*, 471 U. S. 307, 315–316 (1985) (citing *Sandstrom* v. *Montana*, 442 U. S. 510, 516–517 (1979)). Until this Term, there had been little disagreement with this standard. Today, however, a majority of the Court reformulates the appropriate inquiry as "whether there is a reasonable likelihood that the jury has applied the challenged instruction" in an unconstitutional manner. *Boyde* v. *California*, *ante*, at 380.[9] Under either the *Francis* or *Boyde* approach, the antisympathy instruction given in this case was unconstitutional because it interfered with the jury's ability to consider mitigating evidence presented by respondent.

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[9] As JUSTICE MARSHALL ably demonstrates in his dissent in *Boyde*, the majority engages in a sleight of hand to justify the reformulation of the standard of review. See *Boyde*, *ante*, at 387 (MARSHALL, J., dissenting). But in the end, it is unclear how the majority's "reasonable likelihood" standard differs from the prior inquiry into how a reasonable juror could have interpreted the instruction. See *Boyde*, *ante*, at 392 (MARSHALL, J., dissenting) ("It is difficult to conceive how a *reasonable* juror *could* interpret an instruction unconstitutionally where there is no 'reasonable likelihood' that a juror would do so"). To the extent that this new standard is stricter than the standard set forth in *Francis*, I believe it is "irreconcilable

A

"To determine how a reasonable juror could interpret an instruction, we 'must focus initially on the specific language challenged.' . . . If the specific instruction fails constitutional muster, we then review the instructions as a whole to see if the entire charge delivered a correct interpretation of the law." *California* v. *Brown*, *supra*, at 541 (quoting *Francis*, *supra*, at 315–316).[10] In this case, the jury was instructed to "avoid *any* influence of sympathy, sentiment, passion, prejudice or other arbitrary factor when imposing sentence." App. 13 (emphasis added). This instruction is distinguishable from the one upheld in *California* v. *Brown*, *supra*. In that case, the Court rejected the argument that a reasonable juror could have interpreted an instruction not to be "swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" as a command not to consider mitigating evidence. The Court held instead that a reasonable juror would have understood "the instruction not to rely on '*mere* sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase." 479 U. S., at 542

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with bedrock due process principles." *Francis*, 471 U. S., at 322–323, n. 8. Moreover, a stricter standard is especially inappropriate when reviewing the instructions at the sentencing stage of a capital trial. "In death cases doubts [concerning a juror's interpretation of an instruction] should be resolved in favor of the accused." *Andres* v. *United States*, 333 U. S. 740, 752 (1948). See also *Boyde*, *ante*, at 392–394 (MARSHALL, J., dissenting).

[10] "This analysis 'requires careful attention to the words actually spoken to the jury . . . , for whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction.'" *Francis*, *supra*, at 315 (quoting *Sandstrom* v. *Montana*, 442 U. S. 510, 514 (1979)).

(emphasis added). Because the jury in this case was told not to consider *any* sympathy—rather than "mere sympathy"—it is more likely that the jury at respondent's trial understood that when making a moral judgment about respondent's culpability, it was forbidden to take into account any evidence that evoked a sympathetic response.

The context of the sentencing proceedings bolsters this conclusion. The only mitigating evidence proffered by respondent was testimony about his deprived background from his father. Although this evidence was relevant to the sentencing decision because it bore on respondent's culpability, a juror's initial reaction to this evidence might have been to feel sympathy for respondent because of his hardship. A juror who conscientiously followed the instruction to avoid *any* sympathy would have believed that he was required to ignore the father's testimony altogether since only by excluding it completely from consideration could he eliminate all feelings of sympathy for respondent. Moreover, because the father's testimony did not fit within the mitigating circumstances listed by the judge, it was all the more likely that a juror believed that the father's testimony was irrelevant to the sentencing decision.[11] See *California* v. *Brown*, *supra*,

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[11] The trial judge instructed the jury as follows:

"The minimum mitigating circumstances are:

"1. The defendant has no significant history of prior criminal activity;

"2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

"3. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act;

"4. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct;

"5. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

"6. The defendant acted under duress or under the domination of another person;

"7. At the time of the murder the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to at 550 (BRENNAN, J., dissenting) ("It is . . . likely . . . that jurors instructed not to rely on sympathy would conclude that the defendant had simply gone too far in his presentation, and that, as in other trial contexts, the jury must look to the judge for guidance as to that portion of the evidence that appropriately could be considered").

Indeed, the prosecutor's closing argument maintained that respondent's presentation at the sentencing phase constituted an illegitimate sympathy ploy and that the jury was *required* to ignore it.[12] After explaining that none of the minimum mitigating circumstances were supported by the evidence, the prosecutor argued:

> "[Defense counsel's] closing arguments are really a pitch to you for sympathy—sympathy, or sentiment or prejudice; and you told me in voir dire you wouldn't do that.
>
> "Well it's just cold turkey. He either did it or he didn't. He either deserves the death penalty or he doesn't, you know. You leave the sympathy, and the sentiment and prejudice part out of it." App. 75.

Given the sparse amount of evidence presented at the sentencing phase and the prosecutor's theme that the jury's de-

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the requirement of the law was impaired as a result of mental disease or intoxication;

"8. The age of the defendant at the time of the crime." App. 11–12.

[12] Although the prosecutor's comments do not have the force of law, they often are a useful aid in determining how a reasonable juror could have interpreted a particular instruction. See *Boyde*, *ante*, at 385 ("[A]rguments of counsel, like the instructions of the court, must be judged in the context in which they are made"); see also *Brown*, 479 U. S., at 553 (BRENNAN, J., dissenting). This is especially true in the instant case because the trial court instructed the jury on the law before the prosecutor and defense counsel gave closing argument. 5 Tr. 694–733. Thus, the prosecutor's argument was the last thing the jury heard before it began its deliberations.

liberations were to be purely mechanical,[13] there is a reasonable likelihood that the jury believed that the antisympathy instruction barred it from considering respondent's deprived background as a valid reason not to impose the death penalty.

Nothing in the other instructions ensured that the antisympathy instruction would be correctly understood. The trial judge did instruct the jury that it was required to consider a list of minimum mitigating circumstances and that it was free to consider any other factor it deemed mitigating,[14] but these instructions did not cure the infirmity of the antisympathy instruction. Although the judge informed the jury in broad terms that it could consider all relevant mitigating evidence, he never defined the concept of mitigation for the jury. But the jury *was* told that it could not consider "sympathy" and nothing in the jury instructions explained that the command to avoid sympathy did not preclude the consideration of mitigating evidence. At best, then, the instructions sent contradictory messages. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis,* 471 U. S., at 322. "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." *Mills* v. *Maryland,* 486 U. S. 367, 377 (1988).

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[13] The prosecutor stressed this theme from the beginning of the trial. At *voir dire*, he told the jury: "Of course the Court will instruct you that you should not allow sympathy, sentiment or prejudice to enter into your deliberations. And frankly that's just as cold-blooded as you can put it. . . . [Y]ou can be as sympathetic as you want to . . . be, but you can't do it and sit on this jury." App. 8–9. The rest of his closing argument was calculated to assure the jury that their conscience should not bother them because the criminal justice system required that the decision to put respondent to death be "cold-blooded." He argued:

"[Y]ou're not yourself putting Robyn Parks to death. You just have become a part of the criminal justice system that says when anyone does this, that he *must* suffer death. So all you are doing is you're just following the law, and what the law says, and on your verdict—once your verdict comes back in, the law takes over. The law does all of these things, so it's not on your conscience. You're just part of the criminal justice system that says when this type of thing happens, that whoever does such a horrible, atrocious thing *must* suffer death.

"Now that's man's law. But God's law is the very same. God's law says that the murderer shall suffer death. So don't let it bother your conscience, you know." *Id.*, at 39–40 (emphasis added).

[14] The jury was told:

"You must consider all the following minimum mitigating circumstances and determine whether any one or more of them apply to all of the evidence, facts and circumstances of this case. You are not limited in your consideration of the minimum mitigating circumstances set out herein, and you may consider any other or additional mitigating circumstances, if any, that you may find from the evidence to exist in this case. What facts or evidence that may constitute an additional mitigating circumstance is for the jury to determine." *Id.*, at 10–11.

B

The majority suggests that *Lockett* and *Eddings* do not compel the invalidation of the antisympathy instruction because the instruction ensures that the decision to impose the death penalty is "a 'reasoned *moral* response,' rather than an emotional one." *Ante,* at 493 (citation omitted; emphasis in original). Although some recent cases have stated that the decision to impose the death penalty must be a moral decision, see *Brown,* 479 U. S., at 545 (O'CONNOR, J., concurring); *Penry,* 492 U. S., at 319; *Franklin* v. *Lynaugh,* 487 U. S., at 184, 185 (O'CONNOR, J., concurring), those cases have not clearly defined the difference between a "reasoned moral response" and an "emotional" one. Indeed, our earlier cases recognized that "sympathy" is an important ingredient in the Eighth Amendment's requirement of an individualized sentencing determination. In *Woodson* v. *North Carolina,* 428 U. S. 280 (1976), a plurality of the Court held that "[a] process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of *compassionate* or *mitigating* factors stemming from the diverse frailties of humankind." *Id.*, at 304 (emphasis added). The description of "mitigating evidence" as "compassionate or mitigating factors" necessarily includes the concept of sympathy, because "sympathy" is fairly regarded as a synonym for "compassion." Webster's New International Dictionary 544 (2d ed. 1957); Funk & Wagnalls New Standard Dictionary 541 (1952).

We can debate whether sympathy is an emotional reaction that has no place in a decision to impose the death penalty or whether sympathy, although an emotion, plays an important role in forming the jury's *moral* response to the defendant's actions. But this debate is an irrelevant academic exercise if in a particular case the jury is not *informed* of the distinction between the type of reaction to mitigating evidence that is an invalid emotional response and the type of reaction that is an acceptable "reasoned moral response." This Court's incantation of that talismanic phrase cannot hide the fact that the jury instructions in this case did not clearly inform the jurors that their decision whether to impose the death penalty—the most severe sanction available to society—should represent a moral judgment about the defendant's culpability in light of all the available evidence. I would think the Court would at least ensure that *its* views about the propriety of the death penalty were the ones actually transmitted to the jury.

III

The instructions at the sentencing phase of respondent's trial may well have misled the jury about its duty to consider the mitigating evidence respondent presented. Until today, the Court consistently has vacated a death sentence and remanded for resentencing when there was any ambiguity about whether the sentencer actually considered mitigating evidence. See *Eddings* v. *Oklahoma*, 455 U. S., at 119

(O'CONNOR, J., concurring) ("*Woodson* and *Lockett* require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the [sentencer]"). See also *Penry*, *supra*, at 328; *Mills*, *supra*, at 377; *Hitchcock*, 481 U. S., at 399; *Skipper* v. *South Carolina*, 476 U. S. 1, 8 (1986); *Lockett*, 438 U. S., at 608. The Court's failure to adhere to this fundamental Eighth Amendment principle is inexcusable. Distorting respondent's claim and our precedents in order to hide behind the smokescreen of a new standard of retroactivity is even more so.

IV

Even if I did not believe that the antisympathy instruction interfered with the jury's ability to consider and give effect to mitigating evidence, I would vacate respondent's death sentence. I adhere to my view that the death penalty is in all circumstances cruel and unusual punishment. *Gregg* v. *Georgia*, 428 U. S., at 227.

FERENS ET UX. *v.* JOHN DEERE CO., AKA DEERE & CO.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88-1512. Argued November 6, 1989—Decided March 5, 1990

Petitioner husband lost a hand in Pennsylvania when it allegedly became caught in a harvester manufactured by respondent Deere, a Delaware corporation. Petitioners, Pennsylvania residents, delayed taking legal action against Deere until after Pennsylvania's 2-year tort limitations period expired. In the third year, they filed proper diversity suits (1) in a Federal District Court in Pennsylvania, raising contract and warranty claims as to which the applicable Pennsylvania limitations period had not yet run, and (2) in a Federal District Court in Mississippi, where Deere did business, alleging tort causes of action. As to the latter suit, petitioners knew that the federal court had to apply the Mississippi state courts' choice-of-law rules, *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496, under which Mississippi's 6-year tort statute of limitations would apply. The Mississippi court then granted petitioners' motion to transfer the tort action to the Pennsylvania court under 28 U. S. C. § 1404(a), which allows such transfers "[f]or the convenience of parties and witnesses, in the interest of justice." However, the Pennsylvania court declined to honor the Mississippi tort statute of limitations, ruling that, since petitioners had moved for transfer as plaintiffs, the rule in *Van Dusen* v. *Barrack*, 376 U. S. 612—that, following a defendant-initiated § 1404(a) transfer, the transferee court must follow the choice-of-law rules prevailing in the transferor court—was inapplicable. The court therefore dismissed the tort action under Pennsylvania's tort statute of limitations, and the Court of Appeals affirmed.

Held: The policies underlying *Van Dusen*, as well as other considerations, require a transferee forum to apply the law of the transferor court, regardless of who initiated the transfer. Pp. 521–532.

(a) The *Van Dusen* policy that § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction is not violated by applying that case's rule to transfers initiated by plaintiffs. Applying the transferor law will not deprive plaintiffs of any state-law advantages. Moreover, although a defendant may lose a nonlegal advantage if the transferor law controls—*e. g.*, Deere would lose whatever advantage inheres in forcing petitioners to litigate in Mississippi or not at all—that loss is slight, since a plaintiff always can sue in the favorable state court or in diversity and not seek a transfer. Section 1404(a) exists to eliminate inconvenience without altering permissible choices under the federal venue statutes, and it is not its purpose to protect a party's ability to use inconvenience as a shield to discourage or hinder litigation otherwise proper. Applying the transferor law in these circumstances is in full accord with the rule in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, whereas applying the transferee law would seriously undermine *Erie*, since it would mean that initiating a § 1404(a) transfer changes the state law applicable in a diversity case, a result disapproved generally by this Court. See *Van Dusen, supra*, at 636–637. Pp. 524–527.

(b) Applying the transferor State's law with respect to plaintiff-initiated § 1404(a) transfers does not contravene *Van Dusen*'s policy against forum shopping, since, even without § 1404(a), a plaintiff already has the option of shopping for a forum with the most favorable law. Applying the transferee law, by contrast, might create opportunities for forum shopping in an indirect way, since such application, to the extent that it discourages plaintiff-initiated transfers, might give States incentives to enact laws similar to Mississippi's long tort statute of limitations in order to bring in out-of-state business that would not be moved at the instance of the plaintiff. Pp. 527–528.

(c) The *Van Dusen* policy mandating that the § 1404(a) transfer decision turn upon considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law requires application of the transferor law when a plaintiff initiates the transfer. If a law change were to occur following such a transfer, a district court would be at least reluctant, despite convenience considerations, to grant a transfer that would prejudice the defendant. Hardship might occur because plaintiffs may find as many opportunities to exploit application of the transferee law as they would the transferor law. If the transferee law were to apply, moreover, the plaintiff simply would not move to transfer unless the benefits of convenience outweighed the loss of favorable law. The desire to punish the plaintiff who has chosen an inconvenient forum overlooks the facts that § 1404(a) exists for the benefit of witnesses and courts as well as the moving party, and that litigation in an inconvenient forum harms the entire judicial system. Pp. 528–530.

(d) Foresight and judicial economy also favor the simple rule that the transferor law should apply regardless of who makes the § 1404(a) motion. While applying the transferee law to plaintiff-initiated transfers would eliminate cases such as this in the future, that rule would produce undesirable complications and would result in litigation and uncertainty in cases presenting other situations—*e. g.*, a transfer at the request of both parties or by the court on its own motion. Pp. 530–531.

(e) Although requiring a district court in Pennsylvania to apply a Mississippi statute of limitations to a Pennsylvania cause of action might seem to be too generous to petitioners and even to reward them for manipulative conduct, that does not affect the outcome of this case, since Congress gave them the power to seek a § 1404(a) transfer, and *Van Dusen* already could require the same result. Moreover, no alternative rule would be more acceptable. Applying the transferee law would, in effect, tell petitioners that they should have continued litigating their separate actions in Pennsylvania and Mississippi, thereby causing the wastefulness of time, energy, and money that § 1404(a) was designed to prevent. Allowing them simply to file in the convenient forum and then to request application of the law of the inconvenient forum would ignore the fact that § 1404(a) does not provide for an automatic transfer, but requires a showing of convenience and that the transfer is "in the interest of justice." And there is no need to develop more sophisticated federal choice-of-law rules to cover all diversity actions involving transfers, since state conflicts rules already ensure generally that appropriate laws will apply, and, even if more elaborate federal rules would not run afoul of *Klaxon* and *Erie*, applying the transferor law effects the appropriate balance between fairness and simplicity. Pp. 531–532.

862 F. 2d 31, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and O'CONNOR, JJ., joined. SCALIA, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 533.

Richard B. Tucker III argued the cause for petitioners. With him on the briefs was *Stanley V. Ostrow*.

David P. Helwig argued the cause for respondent. With him on the brief was *Gary F. Sharlock*.*

JUSTICE KENNEDY delivered the opinion of the Court.

Section 1404(a) of Title 28 states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C.

**Hugh C. Griffin* filed a brief for the Product Liability Advisory Council as *amicus curiae* urging affirmance.

Larry L. Simms, *Steven C. Kany*, and *C. Paul Cavender* filed a brief for Pfizer Inc. as *amicus curiae*.

§ 1404(a) (1982 ed.). In *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), we held that, following a transfer under § 1404(a) initiated by a defendant, the transferee court must follow the choice-of-law rules that prevailed in the transferor court. We now decide that, when a plaintiff moves for the transfer, the same rule applies.

I

Albert Ferens lost his right hand when, the allegation is, it became caught in his combine harvester, manufactured by Deere & Company. The accident occurred while Ferens was working with the combine on his farm in Pennsylvania. For reasons not explained in the record, Ferens delayed filing a tort suit, and Pennsylvania's 2-year limitations period expired. In the third year, he and his wife sued Deere in the United States District Court for the Western District of Pennsylvania, raising contract and warranty claims as to which the Pennsylvania limitations period had not yet run. The District Court had diversity jurisdiction, as Ferens and his wife are Pennsylvania residents, and Deere is incorporated in Delaware with its principal place of business in Illinois.

Not to be deprived of a tort action, the Ferenses in the same year filed a second diversity suit against Deere in the United States District Court for the Southern District of Mississippi, alleging negligence and products liability. Diversity jurisdiction and venue were proper. The Ferenses sued Deere in the District Court in Mississippi because they knew that, under *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 496 (1941), the federal court in the exercise of diversity jurisdiction must apply the same choice-of-law rules that Mississippi state courts would apply if they were deciding the case. A Mississippi court would rule that Pennsylvania substantive law controls the personal injury claim but that Mississippi's own law governs the limitation period.

Although Mississippi has a borrowing statute which, on its face, would seem to enable its courts to apply statutes of limitations from other jurisdictions, see Miss. Code Ann. § 15–1–65 (1972), the State Supreme Court has said that the borrowing statute "only applies where a nonresident [defendant] in whose favor the statute has accrued afterwards moves into this state." *Louisiana & Mississippi R. Transfer Co.* v. *Long*, 159 Miss. 654, 667, 131 So. 84, 88 (1930). The borrowing statute would not apply to the Ferenses' action because, as the parties agree, Deere was a corporate resident of Mississippi before the cause of action accrued. The Mississippi courts, as a result, would apply Mississippi's 6-year statute of limitations to the tort claim arising under Pennsylvania law and the tort action would not be time barred under the Mississippi statute. See Miss. Code Ann. § 15–1–49 (1972).

The issue now before us arose when the Ferenses took their forum shopping a step further: having chosen the federal court in Mississippi to take advantage of the State's limitations period, they next moved, under § 1404(a), to transfer the action to the federal court in Pennsylvania on the ground that Pennsylvania was a more convenient forum. The Ferenses acted on the assumption that, after the transfer, the choice-of-law rules in the Mississippi forum, including a rule requiring application of the Mississippi statute of limitations, would continue to govern the suit.

Deere put up no opposition, and the District Court in Mississippi granted the § 1404(a) motion. The court accepted the Ferenses' arguments that they resided in Pennsylvania; that the accident occurred there; that the claim had no connection to Mississippi; that a substantial number of witnesses resided in the Western District of Pennsylvania but none resided in Mississippi; that most of the documentary evidence was located in the Western District of Pennsylvania but none was located in Mississippi; and that the warranty action pending in the Western District of Pennsylvania presented common questions of law and fact.

The District Court in Pennsylvania consolidated the transferred tort action with the Ferenses' pending warranty action but declined to honor the Mississippi statute of limitations as the District Court in Mississippi would have done. It ruled instead that, because the Ferenses had moved for transfer as plaintiffs, the rule in *Van Dusen* did not apply. Invoking the 2-year limitations period set by Pennsylvania law, the District Court dismissed their tort action. *Ferens* v. *Deere & Co.*, 639 F. Supp. 1484 (WD Pa. 1986).

The Court of Appeals for the Third Circuit affirmed, but not, at first, on grounds that the Ferenses had lost their entitlement to Mississippi choice-of-law rules by invoking § 1404 (a). The Court of Appeals relied at the outset on the separate theory that applying Mississippi's statute of limitations would violate due process because Mississippi had no legitimate interest in the case. *Ferens* v. *Deere & Co.*, 819 F. 2d 423 (1987). We vacated this decision and remanded in light of *Sun Oil Co.* v. *Wortman*, 486 U. S. 717 (1988), in which we held that a State may choose to apply its own statute of limitations to claims governed by the substantive laws of another State without violating either the Full Faith and Credit Clause or the Due Process Clause. *Ferens* v. *Deere & Co.*, 487 U. S. 1212 (1988). On remand, the Court of Appeals again affirmed, this time confronting the *Van Dusen* question and ruling that a transferor court's choice-of-law rules do not apply after a transfer under § 1404(a) on a motion by a plaintiff. 862 F. 2d 31 (1988). We granted certiorari, 490 U. S. 1064 (1989).

II

Section 1404(a) states only that a district court may transfer venue for the convenience of the parties and witnesses when in the interest of justice. It says nothing about choice of law and nothing about affording plaintiffs different treatment from defendants. We touched upon these issues in *Van Dusen*, but left open the question presented in this case. See 376 U. S., at 640. In *Van Dusen*, an airplane flying from Boston to Philadelphia crashed into Boston Harbor soon after takeoff. The personal representatives of the accident victims brought more than 100 actions in the District Court for the District of Massachusetts and more than 40 actions in the District Court for the Eastern District of Pennsylvania. When the defendants moved to transfer the actions brought in Pennsylvania to the federal court in Massachusetts, a number of the Pennsylvania plaintiffs objected because they lacked capacity under Massachusetts law to sue as representatives of the decedents. The plaintiffs also averred that the transfer would deprive them of the benefits of Pennsylvania's choice-of-law rules because the transferee forum would apply to their wrongful-death claims a different substantive rule. The plaintiffs obtained from the Court of Appeals a writ of mandamus ordering the District Court to vacate the transfer. See *id.*, at 613–615.

We reversed. After considering issues not related to the present dispute, we held that the Court of Appeals erred in its assumption that Massachusetts law would govern the action following transfer. The legislative history of § 1404(a) showed that Congress had enacted the statute because broad venue provisions in federal Acts often resulted in inconvenient forums and that Congress had decided to respond to this problem by permitting transfer to a convenient federal court under § 1404(a). *Id.*, at 634–636. We said:

> "This legislative background supports the view that § 1404(a) was not designed to narrow the plaintiff's venue privilege or to defeat the state-law advantages that might accrue from the exercise of this venue privilege but rather the provision was simply to counteract the inconveniences that flowed from the venue statutes by permitting transfer to a convenient federal court. The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of a law as a bonus for a change of venue.' Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change in the law were in the offing, the parties might

> well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff who initially selected a permissible forum. We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms." *Id.*, at 635–637 (footnotes omitted).

We thus held that the law applicable to a diversity case does not change upon a transfer initiated by a defendant.

III

The quoted part of *Van Dusen* reveals three independent reasons for our decision. First, § 1404(a) should not deprive parties of state-law advantages that exist absent diversity jurisdiction. Second, § 1404(a) should not create or multiply opportunities for forum shopping. Third, the decision to transfer venue under § 1404(a) should turn on considerations of convenience and the interest of justice rather than on the possible prejudice resulting from a change of law. Although commentators have questioned whether the scant legislative history of § 1404(a) compels reliance on these three policies, see Note, Choice of Law after Transfer of Venue, 75 Yale L. J. 90, 123 (1965), we find it prudent to consider them in deciding whether the rule in *Van Dusen* applies to transfers initiated by plaintiffs. We decide that, in addition to other considerations, these policies require a transferee forum to apply the law of the transferor court, regardless of who initiates the transfer. A transfer under § 1404(a), in other words, does not change the law applicable to a diversity case.

A

The policy that § 1404(a) should not deprive parties of state-law advantages, although perhaps discernible in the legislative history, has its real foundation in *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938). See *Van Dusen*, 376 U. S., at 637. The *Erie* rule remains a vital expression of the federal system and the concomitant integrity of the separate States. We explained *Erie* in *Guaranty Trust Co.* v. *York*, 326 U. S. 99, 109 (1945), as follows:

> "In essence, the intent of [the *Erie*] decision was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies *Erie R. Co.* v. *Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result."

In *Hanna* v. *Plumer*, 380 U. S. 460, 473 (1965), we held that Congress has the power to prescribe procedural rules that differ from state-law rules even at the expense of altering the outcome of litigation. This case does not involve a conflict. As in *Van Dusen*, our interpretation of § 1404(a) is in full accord with the *Erie* rule.

The *Erie* policy had a clear implication for *Van Dusen*. The existence of diversity jurisdiction gave the defendants the opportunity to make a motion to transfer venue under § 1404(a), and if the applicable law were to change after transfer, the plaintiff's venue privilege and resulting state-law advantages could be defeated at the defendant's option. 376 U. S., at 638. To allow the transfer and at the same time preserve the plaintiff's state-law advantages, we held that the choice-of-law rules should not change following a transfer initiated by a defendant. *Id.*, at 639.

Transfers initiated by a plaintiff involve some different considerations, but lead to the same result. Applying the transferor law, of course, will not deprive the plaintiff of any state-law advantages. A defendant, in one sense, also will lose no legal advantage if the transferor law controls after a transfer initiated by the plaintiff; the same law, after all, would have applied if the plaintiff had not made the motion. In another sense, however, a defendant may lose a nonlegal advantage. Deere, for example, would lose whatever advantage inheres in not having to litigate in Pennsylvania, or, put another way, in forcing the Ferenses to litigate in Mississippi or not at all.

We, nonetheless, find the advantage that the defendant loses slight. A plaintiff always can sue in the favorable state court or sue in diversity and not seek a transfer. By asking for application of the Mississippi statute of limitations following a transfer to Pennsylvania on grounds of convenience, the Ferenses are seeking to deprive Deere only of the advantage of using against them the inconvenience of litigating in Mississippi. The text of § 1404(a) may not say anything about choice of law, but we think it not the purpose of the section to protect a party's ability to use inconvenience as a shield to discourage or hinder litigation otherwise proper. The section exists to eliminate inconvenience without altering permissible choices under the venue statutes. See *Van Dusen, supra*, at 634–635. This interpretation should come as little surprise. As in our previous cases, we think that "[t]o construe § 1404(a) this way merely carries out its design to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for . . . proceedings in costly and inconvenient forums." *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19, 27 (1960). By creating an opportunity to have venue transferred between courts in different States on the basis of convenience, an option that does not exist absent federal jurisdiction, Congress, with respect to diversity, retained the *Erie* policy while diminishing the incidents of inconvenience.

Applying the transferee law, by contrast, would undermine the *Erie* rule in a serious way. It would mean that initiating a transfer under § 1404(a) changes the state law applicable to a diversity case. We have held, in an isolated circumstance, that § 1404(a) may pre-empt state law. See *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U. S. 22 (1988) (holding that federal law determines the validity of a forum selection clause). In general, however, we have seen § 1404(a) as a housekeeping measure that should not alter the state law governing a case under *Erie*. See *Van Dusen*, *supra*, at 636–637; see also *Stewart Organization*, *supra*, at 37 (SCALIA, J., dissenting) (finding the language of § 1404(a) "plainly insufficient" to work a change in the applicable state law through pre-emption). The Mississippi statute of limitations, which everyone agrees would have applied if the Ferenses had not moved for a transfer, should continue to apply in this case.

In any event, defendants in the position of Deere would not fare much better if we required application of the transferee law instead of the transferor law. True, if the transferee law were to apply, some plaintiffs would not sue these defendants for fear that they would have no choice but to litigate in an inconvenient forum. But applying the transferee law would not discourage all plaintiffs from suing. Some plaintiffs would prefer to litigate in an inconvenient forum with favorable law than to litigate in a convenient forum with unfavorable law or not to litigate at all. The Ferenses, no doubt, would have abided by their initial choice of the District Court in Mississippi had they known that the District Court in Pennsylvania would dismiss their action. If we were to rule for Deere in this case, we would accomplish little more than discouraging the occasional motions by plaintiffs to transfer inconvenient cases. Other plaintiffs would sue in an inconvenient forum with the expectation that the defendants themselves would seek transfer to a convenient forum, resulting in application of the transferor law under *Van Dusen*. See Note, Choice of Law in Federal Court After Transfer of Venue, 63 Cornell L. Rev. 149, 156 (1977). In this case, for example, Deere might have moved for a transfer if the Ferenses had not.

B

Van Dusen also sought to fashion a rule that would not create opportunities for forum shopping. Some commentators have seen this policy as the most important rationale of *Van Dusen*, see, *e. g.*, 19 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4506, p. 79 (1982), but few attempt to explain the harm of forum shopping when the plaintiff initiates a transfer. An opportunity for forum shopping exists whenever a party has a choice of forums that will apply different laws. The *Van Dusen* policy against forum shopping simply requires us to interpret § 1404(a) in a way that does not create an opportunity for obtaining a more favorable law by selecting a forum through a transfer of venue. In the *Van Dusen* case itself, this meant that we could not allow defendants to use a transfer to change the law. 376 U. S., at 636.

No interpretation of § 1404(a), however, will create comparable opportunities for forum shopping by a plaintiff because, even without § 1404(a), a plaintiff already has the option of shopping for a forum with the most favorable law. The Ferenses, for example, had an opportunity for forum shopping in the state courts because both the Mississippi and Pennsylvania courts had jurisdiction and because they each would have applied a different statute of limitations. Diversity jurisdiction did not eliminate these forum shopping opportunities; instead, under *Erie*, the federal courts had to replicate them. See *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S., at 496 ("Whatever lack of uniformity *[Erie]* may produce between federal courts in different states is attributable to our federal system, which leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors"). Applying the transferor law would not give a plaintiff an opportunity to use a transfer to obtain a law that he could not obtain through his initial forum selection. If it does make selection of the most favorable law more convenient, it does no more than recognize a forum shopping choice that already exists. This fact does not require us to apply the transferee law. Section 1404(a), to reiterate, exists to make venue convenient and should not allow the defendant to use inconvenience to discourage plaintiffs from exercising the opportunities that they already have.

Applying the transferee law, by contrast, might create opportunities for forum shopping in an indirect way. The advantage to Mississippi's personal injury lawyers that resulted from the State's then applicable 6-year statute of limitations has not escaped us; Mississippi's long limitation period no doubt drew plaintiffs to the State. Although *Sun Oil* held that the federal courts have little interest in a State's decision to create a long statute of limitations or to apply its statute of limitations to claims governed by foreign law, we should recognize the consequences of our interpretation of § 1404(a). Applying the transferee law, to the extent that it discourages plaintiff-initiated transfers, might give States incentives to enact similar laws to bring in out-of-state business that would not be moved at the instance of the plaintiff.

C

Van Dusen also made clear that the decision to transfer venue under § 1404(a) should turn on considerations of convenience rather than on the possibility of prejudice resulting from a change in the applicable law. See 376 U. S., at 636; *Piper Aircraft Co.* v. *Reyno*, 454 U. S. 235, 253–254, and n. 20 (1981). We reasoned in *Van Dusen* that, if the law changed following a transfer initiated by the defendant, a district court "would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably prejudice the claim of a plaintiff." 376 U. S., at 636. The court, to determine the prejudice, might have to make an elaborate survey of the law, including statutes of limitations, burdens of proof, presumptions, and the like. This would turn what is supposed to be a statute for convenience of the courts into one expending extensive judicial time and resources. Because this difficult task is contrary to the purpose of the statute, in *Van Dusen* we made it unnecessary by ruling that a transfer of venue by the defendant does not result in a change of law. This same policy requires application of the transferor law when a plaintiff initiates a transfer.

If the law were to change following a transfer initiated by a plaintiff, a district court in a similar fashion would be at least reluctant to grant a transfer that would prejudice the defendant. Hardship might occur because plaintiffs may find as many opportunities to exploit application of the transferee law as they would find opportunities for exploiting application of the transferor law. See Note, 63 Cornell L. Rev., at 156. If the transferee law were to apply, moreover, the plaintiff simply would not move to transfer unless the benefits of convenience outweighed the loss of favorable law.

Some might think that a plaintiff should pay the price for choosing an inconvenient forum by being put to a choice of law versus forum. But this assumes that § 1404(a) is for the benefit only of the moving party. By the statute's own terms, it is not. Section 1404(a) also exists for the benefit of the witnesses and the interest of justice, which must include the convenience of the court. Litigation in an inconvenient forum does not harm the plaintiff alone. As Justice Jackson said:

> "Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has

> no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflicts of laws, and in law foreign to itself." *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508–509 (1947).

The desire to take a punitive view of the plaintiff's actions should not obscure the systemic costs of litigating in an inconvenient place.

D

This case involves some considerations to which we perhaps did not give sufficient attention in *Van Dusen*. Foresight and judicial economy now seem to favor the simple rule that the law does not change following a transfer of venue under § 1404(a). Affording transfers initiated by plaintiffs different treatment from transfers initiated by defendants may seem quite workable in this case, but the simplicity is an illusion. If we were to hold that the transferee law applies following a § 1404(a) motion by a plaintiff, cases such as this would not arise in the future. Although applying the transferee law, no doubt, would catch the Ferenses by surprise, in the future no plaintiffs in their position would move for a change of venue.

Other cases, however, would produce undesirable complications. The rule would leave unclear which law should apply when both a defendant and a plaintiff move for a transfer of venue or when the court transfers venue on its own motion. See Note, 63 Cornell L. Rev., at 158. The rule also might require variation in certain situations, such as when the plaintiff moves for a transfer following a removal from state court by the defendant, or when only one of several plaintiffs requests the transfer, or when circumstances change through no fault of the plaintiff making a once convenient forum inconvenient. True, we could reserve any consideration of these questions for a later day. But we have a duty, in deciding this case, to consider whether our decision will create litigation and uncertainty. On the basis of these considerations, we again conclude that the transferor law should apply regardless of who makes the § 1404(a) motion.

IV

Some may object that a district court in Pennsylvania should not have to apply a Mississippi statute of limitations to a Pennsylvania cause of action. This point, although understandable, should have little to do with the outcome of this case. Congress gave the Ferenses the power to seek a transfer in § 1404(a), and our decision in *Van Dusen* already could require a district court in Pennsylvania to apply the Mississippi statute of limitations to Pennsylvania claims. Our rule may seem too generous because it allows the Ferenses to have both their choice of law and their choice of forum, or even to reward the Ferenses for conduct that seems manipulative. We nonetheless see no alternative rule that would produce a more acceptable result. Deciding that the transferee law should apply, in effect, would tell the Ferenses that they should have continued to litigate their warranty action in Pennsylvania and their tort action in Mississippi. Some might find this preferable, but we do not. We have made quite clear that "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain*, 364 U. S., at 26.

From a substantive standpoint, two further objections give us pause but do not persuade us to change our rule. First, one might ask why we require the Ferenses to file in the District Court in Mississippi at all. Efficiency might seem to dictate a rule allowing plaintiffs in the Ferenses' position not to file in an inconvenient forum and then to return to a convenient forum though a transfer of venue, but instead simply to file in the convenient forum and ask for the law of the inconvenient forum to apply. Although our rule may invoke certain formality, one must remember that § 1404(a) does not provide for an automatic transfer of venue. The section, instead, permits a transfer only when convenient and "in the interest of justice." Plaintiffs in the position of the Ferenses must go to the distant forum because they have no guarantee, until the court there examines the facts, that they may obtain a transfer. No one has contested the justice of transferring this particular case, but the option remains open to defendants in future cases. Although a court cannot ignore the systemic costs of inconvenience, it may consider the course that the litigation already has taken in determining the interest of justice.

Second, one might contend that, because no *per se* rule requiring a court to apply either the transferor law or the transferee law will seem appropriate in all circumstances, we should develop more sophisticated federal choice-of-law rules for diversity actions involving transfers. See Note, 75 Yale L. J., at 130–135. To a large extent, however, state conflicts-of-law rules already ensure that appropriate laws will apply to diversity cases. Federal law, as a general matter, does not interfere with these rules. See *Sun Oil*, 486 U. S., at 727–729. In addition, even if more elaborate federal choice-of-law rules would not run afoul of *Klaxon* and *Erie*, we believe that applying the law of the transferor forum effects the appropriate balance between fairness and simplicity. Cf. R. Leflar, American Conflicts Law § 143, p. 293 (3d ed. 1977) (arguing against a federal common law of conflicts).

For the foregoing reasons, we conclude that Mississippi's statute of limitations should govern the Ferenses' action.

We reverse and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

Plaintiffs, having filed this diversity action in Federal District Court in Mississippi, successfully moved for a transfer of venue to the District Court in Pennsylvania where their warranty action was then pending. The question we must decide is which State's choice-of-law principles will govern the case now that it is to be litigated in that court.

The Rules of Decision Act, first placed in the Judicial Code by the Judiciary Act of 1789, currently provides:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S. C. § 1652 (1982 ed.).

In *Erie R. Co.* v. *Tompkins*, 304 U. S. 64 (1938), we held that the Act requires a federal court to apply, in diversity cases, the law of the State in which it sits, both statutory law and common law established by the courts. Three years later, in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U. S. 487, 494 (1941), we considered "whether in diversity cases the federal courts must follow conflict of laws rules prevailing in the states in which they sit." We answered the question in the affirmative, reasoning that, were the rule otherwise, "the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side," a state of affairs that "would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based." *Id.*, at 496. See also *Griffin* v. *McCoach*, 313 U. S. 498, 503 (1941). Although the venue provision of § 1404(a) was enacted after

Klaxon, see 62 Stat. 937, we have repeatedly reaffirmed *Klaxon* since then. See *Nolan* v. *Transocean Air Lines,* 365 U. S. 293 (1961); *Day & Zimmermann, Inc.* v. *Challoner,* 423 U. S. 3 (1975).

The question we must answer today is whether 28 U. S. C. § 1404(a) (1982 ed.) and the policies underlying *Klaxon*—namely, uniformity within a State and the avoidance of forum shopping—produce a result different from *Klaxon* when the suit in question was not filed in the federal court initially, but was transferred there under § 1404(a) on plaintiff's motion. In *Van Dusen* v. *Barrack,* 376 U. S. 612 (1964), we held that a result different from *Klaxon* is produced when a suit has been transferred under § 1404(a) on defendant's motion. Our reasons were two. First, we thought it highly unlikely that Congress, in enacting § 1404(a), meant to provide defendants with a device by which to manipulate the substantive rules that would be applied. 376 U. S., at 633–636. That conclusion rested upon the fact that the law grants the plaintiff the advantage of choosing the venue in which his action will be tried, with whatever state-law advantages accompany that choice. A defensive use of § 1404(a) in order to deprive the plaintiff of this "venue privilege," *id.,* at 634, would allow the defendant to "'get a change of law as a bonus for a change of venue,'" *id.,* at 636 (citation omitted), and would permit the defendant to engage in forum shopping among States, a privilege that the *Klaxon* regime reserved for plaintiffs. Second, we concluded that the policies of *Erie* and *Klaxon* would be undermined by application of the transferee court's choice-of-law principles in the case of a defendant-initiated transfer, *id.,* at 637–640, because then "the 'accident' of federal diversity jurisdiction" would enable the defendant "to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed," *id.,* at 638. The goal of *Erie* and *Klaxon,* we reasoned, was to prevent "forum shopping" as between state and federal systems; the plaintiff makes a choice of forum law by filing the complaint, and that choice must be honored in federal court, just as it would have been honored in state court, where the defendant would not have been able to transfer the case to another State.

We left open in *Van Dusen* the question presented today, viz., whether "the same considerations would govern" if a plaintiff sought a § 1404(a) transfer. 376 U. S., at 640. In my view, neither of those considerations is served—and indeed both are positively defeated—by a departure from *Klaxon* in that context. First, just as it is unlikely that Congress, in enacting § 1404(a), meant to provide the defendant with a vehicle by which to manipulate in his favor the substantive law to be applied in a diversity case, so too is it unlikely that Congress meant to provide the *plaintiff* with a vehicle by which to appropriate the law of a distant and inconvenient forum in which he does not intend to litigate, and to carry that prize back to the State in which he wishes to try the case. Second, application of the transferor court's law in this context would encourage forum shopping between federal and state courts in the same jurisdiction on the basis of differential substantive law. It is true, of course, that the plaintiffs here did not select the *Mississippi* federal court in preference to the Mississippi state courts because of any differential substantive law; the former, like the latter, would have applied Mississippi choice-of-law rules and thus the Mississippi statute of limitations. But one must be blind to reality to say that it is the *Mississippi* federal court in which these plaintiffs have chosen to sue. That was merely a way station en route to suit in the *Pennsylvania* federal court. The plaintiffs were seeking to achieve exactly what *Klaxon* was designed to prevent: the use of a Pennsylvania federal court instead of a Pennsylvania state court in order to obtain application of a different substantive law. Our decision in *Van Dusen* compromised "the principle of uniformity within a state," *Klaxon, supra,* at 496, only in the abstract, but today's decision compromises it precisely in the respect that matters—*i. e.*, insofar as it bears upon the plaintiff's choice between a state and a federal forum. The significant federal judicial policy expressed in *Erie* and *Klaxon* is reduced to a laughingstock if it can so readily be evaded through filing-and-transfer.

The Court is undoubtedly correct that applying the *Klaxon* rule after a plaintiff-initiated transfer would deter a plaintiff in a situation such as exists here from seeking a transfer, since that would deprive him of the favorable substantive law. But that proves only that this disposition achieves what *Erie* and *Klaxon* are designed to achieve: preventing the plaintiff from using "the accident of diversity of citizenship," *Klaxon*, 313 U. S., at 496, to obtain the application of a different law within the State where he wishes to litigate. In the context of the present case, he must either litigate in the State of Mississippi under Mississippi law, or in the Commonwealth of Pennsylvania under Pennsylvania law.

The Court expresses concern, *ante*, at 529–530, that if normal *Erie-Klaxon* principles were applied a district judge might be reluctant to order a transfer, even when faced with the prospect of a trial that would be manifestly inconvenient to the parties, for fear that in doing so he would be ordering what is tantamount to a dismissal on the merits. But where the plaintiff himself has moved for a transfer, surely the principle of *volenti non fit injuria* suffices to allay that concern. The Court asserts that in some cases it is the defendant who will be prejudiced by a transfer-induced change in the applicable law. That seems likely to be quite rare, since it assumes that the plaintiff has gone to the trouble of bringing the suit in a *less* convenient forum, where the law is *less* favorable to him. But where the defendant is disadvantaged by a plaintiff-initiated transfer, I do not see how it can reasonably be said that he has been "prejudiced," since the plaintiff could have brought the suit in the "plaintiff's-law forum" with the law more favorable to him (and the more convenient forum) in the first place. Prejudice to the defendant, it seems to me, occurs only when the plaintiff is enabled to have his cake and eat it too—to litigate in the more convenient forum that he desires, but with the law of the distant forum that he desires.

The Court suggests that applying the choice-of-law rules of the forum court to a transferred case ignores the interest of the federal courts themselves in avoiding the "systemic costs of litigating in an inconvenient place," citing Justice Jackson's eloquent remarks on that subject in *Gulf Oil Corp.* v. *Gilbert*, 330 U. S. 501, 508–509 (1947). *Ante*, at 530. The point, apparently, is that these systemic costs will increase because the change in law attendant to transfer will not only deter the plaintiff from moving to transfer but will also deter the court from ordering *sua sponte* a transfer that will harm the plaintiff's case. Justice Jackson's remarks were addressed, however, not to the operation of § 1404(a), but to "those rather rare cases where the doctrine [of *forum non conveniens*] should be applied." 330 U. S., at 509. Where the systemic costs are that severe, transfer ordinarily will occur whether the plaintiff moves for it or not; the district judge can be expected to order it *sua sponte*. I do not think that the prospect of depriving the plaintiff of favorable law will any more deter a district judge from transferring[1] than it would have deterred a district judge, under the prior regime, from ordering a dismissal *sua sponte* pursuant to the doctrine of *forum non conveniens*. In fact the deterrence to *sua sponte* transfer will be considerably less, since transfer involves no risk of statute-of-limitations bars to refiling.

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[1] The prospective transferor court would not be deterred at all, of course, if we simply extended the *Van Dusen* rule to court-initiated transfers. In my view that would be inappropriate, however, since court-initiated transfer, like plaintiff-initiated transfer, does not confer upon the defendant the advantage of forum shopping for law, *Van Dusen* v. *Barrack*, 376 U. S. 612, 636 (1964), and does not enable the defendant "to utilize a transfer to achieve a result in federal court which could not have been achieved in the courts of the State where the action was filed," *id.*, at 638.

Thus, it seems to me that a proper calculation of systemic costs would go as follows: Saved by the Court's rule will be the incremental cost of trying in forums that are inconvenient (but not so inconvenient as to prompt the court's *sua sponte* transfer) those suits that are now filed in such forums for choice-of-law purposes. But incurred by the Court's rule will be the costs of considering and effecting transfer, not only in those suits but in the indeterminate number of additional suits that will be filed in inconvenient forums now that filing-and-transfer is an approved form of shopping for law; plus the costs attending the necessity for transferee courts to figure out the choice-of-law rules (and probably the substantive law) of distant States much more often than our *Van Dusen* decision would require. It should be noted that the file-and-transfer ploy sanctioned by the Court today will be available not merely to achieve the relatively rare (and generally unneeded) benefit of a longer statute of limitations, but also to bring home to the desired state of litigation all sorts of favorable choice-of-law rules regarding substantive liability—in an era when the diversity among the States in choice-of-law principles has become kaleidoscopic.[2]

The Court points out, apparently to deprecate the prospect that filing-and-transfer will become a regular litigation strategy, that there is "no guarantee" that a plaintiff will be accorded a transfer; that while "[n]o one has contested the justice of transferring this particular case," that option "remains open to defendants in future cases"; and that "[a]lthough a court cannot ignore the systemic costs of inconvenience, it may consider the course that the litigation already has taken in determining the interest of justice." *Ante*, at 532. I am not sure what this means—except that it plainly does not mean what it must mean to foreclose the filing-and-transfer option, namely, that transfer can be denied because the plaintiff was law shopping. The whole theory of the Court's opinion is that it is not in accord with the policy of § 1404(a) to deprive the plaintiff of the "state-law advantages" to which his "venue privilege" entitles him. *Ante*, at 524. The Court explicitly repudiates "[t]he desire to take a punitive view of the plaintiff's actions," *ante*, at 530, and to make him "pay the price for choosing an inconvenient forum by being put to a choice of law versus forum," *ante*, at 529. Thus, all the Court is saying by its "no guarantee" language is that the plaintiff must be careful to choose a *really inconvenient* forum if he wants to be sure about getting a transfer. That will often not be difficult. In sum, it seems to me quite likely that today's decision will cost the federal courts more time than it will save them.

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[2] The current edition of Professor Leflar's treatise on American Conflicts Law lists 10 separate theories of choice of law that are applied, individually or in various combinations, by the 50 States. See R. Leflar, L. McDougall III, & R. Felix, American Conflicts Law §§ 86–91, 93–96 (4th ed. 1986). See also Kay, Theory into Practice: Choice of Law in the Courts, 34 Mercer L. Rev. 521, 525–584, 591–592 (1983).

Thus, even as an exercise in giving the most extensive possible scope to the policies of § 1404(a), the Court's opinion seems to me unsuccessful. But as I indicated by beginning this opinion with the Rules of Decision Act, that should not be the object of the exercise at all. The Court and I reach different results largely because we approach the question from different directions. For the Court, this case involves an "interpretation of § 1404(a)," *ante*, at 524, and the central issue is whether *Klaxon* stands in the way of the policies of that statute. For me, the case involves an interpretation of the Rules of Decision Act, and the central issue is whether § 1404(a) alters the "principle of uniformity within a state" which *Klaxon* says that Act embodies. I think my approach preferable, not only because the Rules of Decision Act does, and § 1404(a) does not, address the specific subject of which law to apply, but also because, as the Court acknowledges, our jurisprudence under that statute is "a vital expression of the federal system and the concomitant integrity of the separate States," *ante*, at 523. To ask, as in effect the Court does, whether *Erie* gets in the way of § 1404(a), rather than whether § 1404(a) requires adjustment of *Erie*, seems to me the expression of a mistaken sense of priorities.

For the foregoing reasons, I respectfully dissent.

SMITH *v.* OHIO

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

No. 89–5999. Decided March 5, 1990

As petitioner Smith was approached by two police officers, he threw the bag he was carrying onto his car's hood and, when asked, refused to reveal its contents. Although he attempted to protect the bag, one officer opened it and discovered drug paraphernalia that provided probable cause for Smith's arrest and evidence to support his conviction for drug abuse. The Ohio Supreme Court upheld the bag's warrantless search under the exception for searches incident to arrest, finding that the search was constitutional because its fruits justified the arrest that followed.

Held: A warrantless search providing probable cause for an arrest cannot be justified as an incident of that arrest. While the incident to arrest exception permits the police to search a lawfully arrested individual and areas within his immediate control, it does not permit them to search any citizen without a warrant or probable cause so long as an arrest follows. Contrary to the State's argument, a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned his property.

Certiorari granted; 45 Ohio St. 3d 255, 544 N. E. 2d 239, reversed.

PER CURIAM.

This case raises the single question whether a warrantless search that provides probable cause for an arrest can nonetheless be justified as an incident of that arrest. A divided Ohio Supreme Court answered that question in the affirmative, reasoning that the search was neither remote in time nor place from the arrest. We disagree.

On a June evening, as petitioner and a companion exited a private residence and entered the parking lot of a YMCA, they were approached by two plainclothes officers of the Ashland, Ohio, Police Department. The officers were driving in an unmarked police vehicle. Petitioner was carrying a brown paper grocery bag with the words "Kash 'n Karry" and "Loaded with Low Prices" printed on the outside in a manner that the officers later described as "gingerly." Neither officer knew petitioner or his companion. One of the two officers, Officer Thomas, exited the vehicle and, without identifying himself, asked petitioner to "'come here a minute.'" 45 Ohio St. 3d 255, 256, 544 N. E. 2d 239, 240 (1989). Petitioner did not respond and kept walking. When Officer Thomas identified himself as a police officer, petitioner "threw the sack he was carrying onto the hood of [his] car and turned to face Thomas who was approaching." *Ibid.* Officer Thomas asked petitioner what the bag contained; petitioner did not respond; Officer Thomas then rebuffed petitioner's attempt to protect the bag, pushed petitioner's hand away, and opened the bag. The drug paraphernalia discovered within provided probable cause for the arrest and evidence sufficient to support petitioner's conviction for drug abuse.

No contention has been raised in this case that the officer's reaching for the bag involved a self-protective action necessary for the officer's safety. See *Terry* v. *Ohio*, 392 U. S. 1 (1968). Although the Fourth Amendment may permit a brief detention of property on the basis of only "reasonable, articulable suspicion" that it contains contraband or evidence of criminal activity, *United States* v. *Place*, 462 U. S. 696, 702 (1983), it proscribes—except in certain well-defined circumstances—the search of that property unless accomplished pursuant to judicial warrant issued upon probable cause. See, *e. g., Skinner* v. *Railway Labor Executives' Assn.*, 489 U. S. 602, 619 (1989); *Mincey* v. *Arizona*, 437 U. S. 385, 390 (1978); *Katz* v. *United States*, 389 U. S. 347, 357 (1967). That guarantee protects alike the "traveler who carries a toothbrush and a few articles of clothing in a paper bag" and "the sophisticated executive with the locked attaché case." *United States* v. *Ross*, 456 U. S. 798, 822 (1982). The Ohio Supreme Court upheld the warrantless search of petitioner's bag under the exception for searches incident to arrest. See *United States* v. *Chadwick*, 433 U. S. 1, 14–15 (1977); *Chimel* v. *California*, 395 U. S. 752, 763 (1969). The court stated that petitioner was not arrested until after the contraband was discovered in the search of the bag. 45 Ohio St. 3d, at 257, 258, 544 N. E. 2d, at 241, 242. It nonetheless held that the search was constitutional because its fruits justified the arrest that followed.

That reasoning, however, "justify[ing] the arrest by the search and at the same time . . . the search by the arrest," just "will not do." *Johnson* v. *United States*, 333 U. S. 10, 16–17 (1948). As we have had occasion in the past to observe, "[i]t is axiomatic that an incident search may not precede an arrest and serve as part of its justification." *Sibron* v. *New York*, 392 U. S. 40, 63 (1968); see also *Henry* v. *United States*, 361 U. S. 98, 102 (1959); *Rawlings* v. *Kentucky*, 448 U. S. 98, 111, n. 6 (1980). The exception for searches incident to arrest permits the police to search a lawfully arrested person and areas within his immediate control. Contrary to the Ohio Supreme Court's reasoning, it does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows.

The State does not defend the reasoning of the Ohio Supreme Court, but rather contends that petitioner abandoned the bag when he threw it on his car and turned to face Officer Thomas. See *Abel* v. *United States*, 362 U. S. 217, 241 (1960); *Hester* v. *United States*, 265 U. S. 57, 58 (1924). That argument was unanimously rejected by the Ohio Supreme Court, 45 Ohio St. 3d, at 263, n. 6, 544 N. E. 2d, at 246, n. 6; *id.*, at 266, 544 N. E. 2d, at 249 (Sweeney, J., dissenting); *id.*, at 273–274, 544 N. E. 2d, at 255, n. 10 (Wright, J., dissenting), and we have no reason to disturb its conclusion. As the state court properly recognized, a citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer's inquiry, clearly has not abandoned that property. Cf. *Rios* v. *United States*, 364 U. S. 253, 262, n. 6 (1960).

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted, and the judgment of the Supreme Court of Ohio is

Reversed.

JUSTICE MARSHALL, dissenting.

Although I agree that the limited information before us appears to indicate that the Ohio Supreme Court erred in its decision below, I continue to believe that summary dispositions deprive litigants of a fair opportunity to be heard on the merits and significantly increase the risk of an erroneous decision. See *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11–12 (1988) (MARSHALL, J., dissenting); *Rhodes* v. *Stewart*, 488 U. S. 1, 4–5 (1988) (MARSHALL, J., dissenting); *Buchanan* v. *Stanships, Inc.*, 485 U. S. 265, 269–270 (1988) (MARSHALL, J., dissenting); *Commissioner* v. *McCoy*, 484 U. S. 3, 7–8 (1987) (MARSHALL, J., dissenting). I therefore dissent from the Court's decision today to reverse summarily the judgment below.

LYTLE *v.* HOUSEHOLD MANUFACTURING, INC., DBA SCHWITZER TURBOCHARGERS

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–334. Argued January 8, 1990—Decided March 20, 1990

Petitioner Lytle, an Afro-American, filed an action under both Title VII of the Civil Rights Act of 1964 and 42 U. S. C. § 1981, alleging that respondent Schwitzer Turbochargers had terminated his employment because of his race and had retaliated against him for filing a charge with the Equal Employment Opportunity Commission by subsequently providing inadequate references to prospective employers. He requested a jury trial on all issues triable by a jury. After concluding that Title VII provided the exclusive remedy, the District Court dismissed the § 1981 claims and conducted a bench trial on the Title VII claims. It granted Schwitzer's motion to dismiss the discriminatory discharge claim pursuant to Federal Rule of Civil Procedure 41(b) at the close of Lytle's case in chief and entered a judgment for Schwitzer on the retaliation claim after both parties had presented all their evidence. The Court of Appeals affirmed but noted that the dismissal of the § 1981 claims was "apparently erroneous" because the Title VII and § 1981 remedies were separate, independent, and distinct. Nonetheless, it ruled that the District Court's findings with respect to the Title VII claims collaterally estopped Lytle from litigating his § 1981 claims because the elements of a cause of action under the two statutes are identical. It rejected Lytle's claim that the Seventh Amendment—which preserves the right to trial by jury for suits involving legal, as opposed to equitable, claims—precluded according collateral-estoppel effect to the District Court's findings, reasoning that the judicial interest in economy of resources overrode Lytle's interest in relitigating the issues before a jury.

Held:

1. The Seventh Amendment precludes according collateral-estoppel effect to a district court's determinations of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. Pp. 550–556.

(a) But for the dismissal of Lytle's § 1981 legal claims, he would have been entitled to a jury trial on all issues common to them and his Title VII equitable claims, *Curtis* v. *Loether*, 415 U. S. 189, 196, n. 11, and the jury would have been required to resolve the legal claims before the court considered the equitable claims, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 510–511; *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 473. The holding in *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322—that a court's determinations of issues in an equitable action could collaterally estop relitigation of the same issues in a *subsequent* legal action without violating a litigant's right to a jury trial—cannot be extended to the present situation. Although the trial court had no legal issues before it when it made its findings, relitigation in this case would not in effect constitute a second, separate action, because it was only the court's erroneous dismissal of the § 1981 claims that enabled it to resolve the equitable claims first. It would be anomalous to hold that a district court cannot deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but may accomplish the same result by erroneously dismissing the legal claim. Pp. 550–552.

(b) This conclusion is consistent with this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues, which is to reverse and remand each case in its entirety for a jury trial rather than to accord the trial court's factual findings collateral-estoppel effect. See, *e. g.*, *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33. Furthermore, the purposes served by the collateral-estoppel doctrine—to protect parties from multiple lawsuits and the possibility of inconsistent decisions, and to conserve judicial resources—do not justify applying it here. This case involves one suit in which the plaintiff properly joined his legal and equitable claims. Furthermore, relitigation would not dissipate judicial resources in "needless litigation," because a new trial is essential to vindicating Lytle's Seventh Amendment rights. Pp. 552–554.

2. The argument that the Court of Appeals' judgment should be affirmed because the District Court would have directed a verdict in Schwitzer's favor even if the § 1981 claims had been tried before a jury is rejected. The contention that the court would have directed a verdict on the § 1981 discriminatory discharge claim because it dismissed the similar Title VII claim ignores the important distinction between dismissal under Rule 41(b), which allows the court to determine the facts and the law in deciding whether to render judgment against the plaintiff before the close of all the evidence, and a directed verdict under Rule 50(a), which requires a court to draw all factual inferences in favor of the nonmoving party. The court—which noted that Lytle's interpretation of the evidence supporting his claim was "reasonable"—would not neces-

sarily have taken the case away from the jury. Schwitzer's argument with respect to Lytle's retaliation claim is even further off base, because the trial court declined to dismiss that claim, and nothing in the record indicates that the court—after hearing all the evidence—reached the only reasonable conclusions or that a jury could not have found the facts differently and entered a different verdict. Pp. 554–555.

831 F. 2d 1057, vacated and remanded.

MARSHALL, J., delivered the opinion for a unanimous Court. O'CONNOR, J., filed a concurring opinion, in which SCALIA, J., joined, *post*, p. 556.

Judith Reed argued the cause for petitioner. With her on the briefs were *Julius LeVonne Chambers, Charles Stephen Ralston, Ronald L. Ellis, Eric Schnapper*, and *Penda D. Hair.*

H. Lane Dennard, Jr., argued the cause for respondent. With him on the brief was *A. Bruce Clarke.**

JUSTICE MARSHALL delivered the opinion of the Court.

In *Parklane Hosiery Co.* v. *Shore*, 439 U. S. 322 (1979), we held that a court's determinations of issues in an equitable action could collaterally estop relitigation of the same issues in a subsequent legal action without violating a litigant's right to a jury trial. *Id.*, at 333. In this case, petitioner brought both equitable and legal claims in the same action, but the District Court erroneously dismissed the legal claims. We must determine whether the District Court's resolution of the issues raised by petitioner's equitable claims bars relitigation of the same issues before a jury in the context of his legal claims. We hold that collateral estoppel does not preclude relitigation of those issues in these circumstances.

I

John Lytle, an Afro-American, worked as a machinist for Schwitzer Turbochargers, a subsidiary of Household Manu-

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**Robert W. Williams, Douglas S. McDowell*, and *Garen E. Dodge* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging affirmance.

facturing, Inc. On August 11, 1983, Lytle asked his supervisor if he could take a vacation day on Friday, August 12, so that he could see a doctor. Although his supervisor approved that request, the supervisor later told Lytle that he was required to work on Saturday, August 13. Lytle objected because he would be too ill to work on Saturday. He did not report for work on either day, and the parties dispute whether he informed his employer of his intention to be absent both days. Schwitzer classified Lytle's absences as "unexcused." Under the company's discharge policy, more than eight hours of unexcused absences within a 12-month period provides grounds for dismissal. On that basis, Schwitzer fired Lytle.

Lytle filed a complaint with the Equal Employment Opportunity Commission (EEOC), alleging that he had been treated differently from white workers who had missed work. At the same time, Lytle applied for jobs with other employers, several of whom sought references from Schwitzer. Lytle alleges that his job search was unsuccessful because Schwitzer provided prospective employers only with Lytle's dates of employment and his job title.

After receiving a right to sue letter from the EEOC, Lytle filed this action seeking monetary and injunctive relief under both Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U. S. C. § 2000e *et seq.* (1982 ed.), and 16 Stat. 144, 42 U. S. C. § 1981 (1982 ed.). He alleged that Schwitzer had discharged him because of his race and had retaliated against him for filing a charge with the EEOC by providing inadequate references to prospective employers. In his complaint, Lytle requested a jury trial on all issues triable by a jury.

At the beginning of the trial, the District Court dismissed Lytle's § 1981 claims, concluding that Title VII provided the exclusive remedy for Lytle's alleged injuries. The District

Court then conducted a bench trial on the Title VII claims.[1] At the close of Lytle's case in chief, the court granted Schwitzer's motion to dismiss the claim of discriminatory discharge pursuant to Federal Rule of Civil Procedure 41(b) ("After the plaintiff, in an action tried by the court without a jury, has completed the presentation of evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence"). After both parties had presented all their evidence, the judge entered a judgment in favor of Schwitzer on the retaliation claim.

The Court of Appeals affirmed, 831 F. 2d 1057 (CA4 1987) (judgment order), but noted that the dismissal of the § 1981 claims was "apparently erroneous" because "Title VII and § 1981 remedies [are] separate, independent and distinct." App. to Pet. for Cert. 7a, n. 2. Nevertheless, it ruled that the District Court's findings with respect to the Title VII claims collaterally estopped Lytle from litigating his § 1981 claims because the elements of a cause of action under § 1981 are identical to those under Title VII. The Court of Appeals rejected Lytle's claim that the Seventh Amendment precluded according collateral-estoppel effect to the District Court's findings, reasoning that the judicial interest in economy of resources overrode Lytle's interest in relitigating the issues before a jury.[2] We granted certiorari, 492 U. S. 917 (1989), and now reverse.

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[1] Under Fourth Circuit precedent, a plaintiff does not have a right to a jury trial on a Title VII claim. See *Keller* v. *Prince George's County*, 827 F. 2d 952, 955 (1987). This Court has not ruled on the question whether a plaintiff seeking relief under Title VII has a right to a jury trial. See *Chauffeurs, Teamsters and Helpers* v. *Terry*, *post*, at 572. Because Lytle does not argue that he was entitled to a jury trial on his Title VII claims, we express no opinion on that issue here. Instead, we assume for purposes of this opinion that he has no such right.

II

The Seventh Amendment preserves the right to trial by jury in "Suits at common law." Respondent does not dispute that, had the District Court not dismissed Lytle's § 1981 claims, Lytle would have been entitled to a jury trial on those claims. See *Patterson* v. *McLean Credit Union*, 491 U. S. 164, 211–212, 216 (1989) (BRENNAN, J., concurring in judgment in part and dissenting in part). When legal and equitable claims are joined in the same action, "the right to jury trial on the legal claim, including all issues common to both claims, remains intact." *Curtis* v. *Loether*, 415 U. S. 189, 196, n. 11 (1974). Further, had the § 1981 claims remained in the suit, a jury would have been required to resolve those claims before the court considered the Title VII claims, because "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims." *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 510–511 (1959) (footnote omitted). Accord, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469, 473 (1962). The Court in *Beacon Theatres* emphasized the importance of the order in which legal and equitable claims joined in one suit would be resolved because it "thought that if an issue common to both legal and equitable claims was first determined by a judge, relitigation of the issue before a jury might be foreclosed by res judicata or collateral estoppel." *Parklane Hosiery Co.*, 439 U. S., at 334.

In *Parklane Hosiery Co.*, this Court held that "an equitable determination can have collateral-estoppel effect in a *subsequent* legal action and that this estoppel does not violate the Seventh Amendment." *Id.*, at 335 (emphasis added). In that case, a judgment had already been issued by a District Court and affirmed on appeal in a suit in which a jury trial was not constitutionally required. This Court held that the District Court's resolution of issues in that case collaterally estopped relitigation of the same issues in a second, separate action, even though the plaintiff was entitled to a jury trial in the second action. Respondent argues that this case is governed by *Parklane Hosiery Co.*, rather than by *Beacon Theatres*, because the District Court made its findings when no legal claims were pending before it. In respondent's view, if an appellate court finds that a trial court's dismissal of legal claims was erroneous and remands the legal claims to the trial court, that case would in effect constitute a separate action and therefore be subject to collateral estoppel under *Parklane Hosiery Co.*

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[2] The Fourth Circuit's decision to apply collateral estoppel in this situation directly conflicts with the Seventh Circuit's decision in *Hussein* v. *Oshkosh Motor Truck Co.*, 816 F. 2d 348 (1987).

We are not persuaded. Only the District Court's erroneous[3] dismissal of the § 1981 claims enabled that court to re-

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[3] Respondent argues that dismissal of Lytle's § 1981 claims was not erroneous because Lytle's allegations do not state § 1981 claims in light of this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989). Under our Rules, "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court." This Court's Rule 14.1(a). The question of *Patterson*'s effect on Lytle's claims is not even remotely related to the question on which we granted certiorari. See Pet. for Cert. i ("Did the Fourth Circuit correctly hold that district court violations of the Seventh Amendment are unreviewable by the appellate courts if the trial judge, after violating the Amendment by refusing to empanel a jury, compounds that constitutional infraction by deciding himself the very factual issue which should have been presented to and decided by a jury?").

Respondent nonetheless contends that, whether or not the *Patterson* issue is fairly included in the question presented, the Court can consider its argument because, as the prevailing party below, it may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington* v. *Yakima Indian Nation*, 439 U. S. 463, 476, n. 20 (1979). The argument that the allegations of discriminatory dissolve issues common to both claims, issues that otherwise would have been resolved by a jury. But for that erroneous ruling, this case would be indistinguishable from *Beacon Theatres* and *Dairy Queen.* It would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim. Such a holding would be particularly unfair here because Lytle was required to join his legal and equitable claims to avoid the bar of res judicata. See *Harnett* v. *Billman,* 800 F. 2d 1308, 1315 (CA4 1986) (holding that prior adjudication barred a claim that arose out of the same transactions and that could have been raised in prior suit).

Our conclusion is consistent with this Court's approach in cases involving a wrongful denial of a petitioner's right to a jury trial on legal issues. In such cases, we have never accorded collateral-estoppel effect to the trial court's factual

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charge and retaliation did not concern conduct within the scope of § 1981 as defined by *Patterson,* however, was not presented to either court below, nor is it supported by arguments in the record. We therefore find nothing in the record to justify affirming the Fourth Circuit's judgment on the ground that Lytle has not stated a cause of action under § 1981.

Respondent also argues that because *Patterson* was decided after Lytle filed his petition for a writ of certiorari but before we granted the petition, the Court can consider that decision's effect on Lytle's § 1981 claims. In other words, respondent claims that the intervening decision is an extraordinary circumstance that justifies departing from our Rules. We are not persuaded that an exception is warranted in this case. Applying our analysis in *Patterson* to the facts of a particular case without the benefit of a full record or lower court determinations is not a sensible exercise of this Court's discretion. See *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation,* 402 U. S. 313, 320, n. 6 (1971); *Sure-Tan, Inc.* v. *NLRB,* 467 U. S. 883, 896, n. 7 (1984). Cf. *Piccirillo* v. *New York,* 400 U. S. 548 (1971) (dismissing a writ of certiorari as improvidently granted because both parties agreed that an intervening state-court judgment rendered any decision by this Court meaningless). On remand, the Fourth Circuit should consider the impact of *Patterson* on Lytle's § 1981 claims.

determinations. Instead, we have reversed and remanded each case in its entirety for a trial before a jury. See *Meeker* v. *Ambassador Oil Corp.*, 375 U. S. 160 (1963) *(per curiam)* (reversing trial court's decision to try equitable claims first and thereby to bar jury trial on legal claims that relied on the same facts); *Tull* v. *United States*, 481 U. S. 412 (1987) (reversing and remanding claims for monetary penalties and injunctive relief because trial court improperly denied plaintiff a jury trial on the claims for monetary penalties); *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989) (reversing and remanding Bankruptcy Court's judgment because petitioners were denied a jury trial and according no weight to trial judge's factual findings).

Furthermore, the purposes served by collateral estoppel do not justify applying the doctrine in this case. Collateral estoppel protects parties from multiple lawsuits and the possibility of inconsistent decisions, and it conserves judicial resources. *Montana* v. *United States*, 440 U. S. 147, 153–154 (1979). Application of collateral estoppel is unnecessary here to prevent multiple lawsuits because this case involves one suit in which the plaintiff properly joined his legal and equitable claims. Moreover, our refusal to apply collateral estoppel does not dissipate judicial resources in "needless litigation" over previously resolved issues, *Parklane Hosiery Co.*, 439 U. S., at 326. Although our holding requires a new trial in this case, we view such litigation as essential to vindicating Lytle's Seventh Amendment rights. The relitigation of factual issues before a jury is no more "needless" in this context than in cases in which a trial court erroneously concludes that a claim is equitable rather than legal, see, *e. g.*, *Dairy Queen, Inc.* v. *Wood*, 369 U. S. 469 (1962), or that resolution of an equitable claim can precede resolution of a legal claim, see, *e. g.*, *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959). In all of these circumstances, relitigation is the only mechanism that can completely correct the error of the court below. Thus, concern about judicial economy, to the extent that it supports respondent's position, remains an insufficient basis for departing from our longstanding commitment to preserving a litigant's right to a jury trial.

III

Respondent argues that notwithstanding our resolution of the collateral-estoppel issue, we should affirm the Court of Appeals' judgment because the record indicates that the District Court would have directed a verdict in favor of respondent on the § 1981 claims even if those claims had been litigated before a jury. This argument is not compelling with respect to either the discriminatory discharge claim or the retaliation claim.

Pursuant to Federal Rule of Civil Procedure 41(b), the District Court dismissed the Title VII claim relating to allegations of discriminatory discharge. After making several factual findings on the basis of evidence adduced by Lytle, Tr. 258, the court concluded that he had not established a prima facie case. *Id.*, at 259. Respondent contends that this ruling establishes that the court would also have directed a verdict against Lytle on his similar § 1981 claim because that claim required proof of the same prima facie case.

Respondent's reasoning ignores the important distinction between a dismissal under Rule 41(b) and a directed verdict under Rule 50(a). Rule 41(b) allows the court "as trier of the facts" to determine the facts and the law "and render judgment against the plaintiff or . . . decline to render any judgment until the close of all the evidence." In contrast, in considering a motion for a directed verdict, the court does not weigh the evidence, but draws all factual inferences in favor of the nonmoving party. *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . . The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Thus, although a court might, after reviewing the evidence, decide in favor of the party moving for a dismissal under Rule 41(b), that court might not take the same case away from the jury because it might believe that the jury could *reasonably* find for the nonmoving party. The District Court's observation that Lytle's interpretation of the evidence supporting his discriminatory discharge claims was "reasonable," Tr. 253, supports our conclusion that that court would not necessarily have granted a directed verdict on Lytle's similar § 1981 claim.

Respondent's argument with respect to Lytle's allegations of retaliation is even further off base. The District Court declined to dismiss the retaliation claim, finding that Lytle had adduced some evidence of disparate treatment, Tr. 256, 257, and required respondent to present evidence on that issue. After both parties presented closing statements, the court found no evidence of discrimination on the part of respondent, *id.*, at 301, and then entered a judgment in respondent's favor. Nothing in the record indicates that the court reached the only reasonable conclusions or that a jury could not have found the facts differently and entered a different verdict. As we have long recognized, a jury and a judge can draw different conclusions from the same evidence. See, *e. g.*, *Railroad Co.* v. *Stout*, 17 Wall. 657, 664 (1874). Thus, we are not convinced that the District Court would have granted a motion for a directed verdict on Lytle's § 1981 claim concerning retaliation.

IV

We decline to extend *Parklane Hosiery Co.*, *supra*, and to accord collateral-estoppel effect to a district court's determinations of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. To hold otherwise would seriously undermine a plaintiff's right to a jury trial under the Seventh Amendment. We therefore vacate the judgment of the Fourth Circuit, vacate the decision of the District Court with respect to Lytle's Title VII claims,[4] and remand for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE SCALIA joins, concurring.

I join the Court's opinion but write separately to note what the Court acknowledges in the last sentence of a footnote, see *ante*, at 551–552, n. 3: that the question whether petitioner has stated a valid claim under § 1981 remains open. In the District Court, petitioner claimed that respondent had fired him because of his race and retaliated against him for filing a charge of discrimination with the Equal Employment Opportunity Commission. *Ante*, at 548. As *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989), was decided after the Court of Appeals issued its decision, the applicability of § 1981 to these claims was not specifically addressed. This Court's usual practice is to decline to address questions raised for the first time here. See *United States* v. *Mendenhall*, 446 U. S. 544, 551–552, n. 5 (1980); *Youakim* v. *Miller*, 425 U. S. 231, 234 (1976). The Court adheres to this practice, noting that arguments based on *Patterson* neither were "presented to either court below" nor are to be found "in the record." *Ante*, at 552, n. 3. The Court correctly concludes that there is "therefore . . . nothing in the record to justify affirming the Fourth Circuit's judgment" at this juncture. *Ibid.* On remand, therefore, the parties will have ample opportunity to present arguments, and the lower courts will have the first opportunity to consider whether either of petitioner's charges relates to the formation or enforcement of a contract, the two types of claims actionable under § 1981, *Patterson*, 491 U. S., at 176–178, or relates only to "postformation conduct unrelated to an employee's right to enforce [his] contract." *Id.*, at 180.

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[4] Vacating the District Court's determination regarding Lytle's Title VII claims is required to afford Lytle complete and consistent relief. Had his § 1981 claims not been dismissed, the jury's determination of legal and factual issues could not have been disregarded when the District Court considered his equitable claims. Moreover, vacating the District Court's judgment avoids the possibility of inconsistent determinations. See *Montana* v. *United States*, 440 U. S. 147, 154 (1979) (noting that inconsistent decisions pose threat of diminishing reliance on the judiciary).

CHAUFFEURS, TEAMSTERS AND HELPERS LOCAL NO. 391 *v.* TERRY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 88–1719. Argued December 6, 1989—Decided March 20, 1990

McLean Trucking Company and petitioner Chauffeurs, Teamsters and Helpers Local No. 391 (Union) were parties to a collective-bargaining agreement which covered respondent employees. When the Union declined to refer to the grievance committee respondents' charges against McLean—arising from McLean's layoff and recall policies—on the ground that the relevant issues had been determined in two prior proceedings concerning complaints that the Union had referred to the committee on respondents' behalf, respondents filed suit in the District Court. Alleging that McLean had breached the collective-bargaining agreement in violation of § 301 of the Labor Management Relations Act, 1947, and that the Union had violated its duty of fair representation, they requested injunctive relief and, *inter alia*, compensatory damages for lost wages and health benefits. They also made a jury demand for all issues triable by a jury. After McLean filed for bankruptcy, the action against it, and all claims for injunctive relief, were dismissed. The Union then moved to strike the jury demand on the ground that no right to a jury trial exists in a duty of fair representation suit. The District Court denied the motion, and the Court of Appeals affirmed, holding that the Seventh Amendment entitled respondents to a jury trial on their claim for monetary relief.

Held: The judgment is affirmed.

863 F. 2d 334, affirmed.

JUSTICE MARSHALL delivered the opinion of the Court with respect to Parts I, II, III–B, and IV, concluding that the Seventh Amendment entitles respondents to a jury trial. Pp. 563–564, 570–574.

(a) To recover money damages in an action for breach of the duty of fair representation, an employee must prove both that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation in handling the grievance. *DelCostello* v. *Teamsters*, 462 U. S. 151, 163–164. Pp. 563–564.

(b) The remedy respondents seek entitles them to a jury trial on all issues presented in the suit. That remedy—compensatory damages—is traditionally legal relief and has none of the attributes that must be present before this Court will characterize money damages as equitable.

The relief is not restitutionary, because the backpay sought is not money wrongfully held by the Union, but wages and benefits respondents would have received from McLean had the Union processed their grievances properly. Nor is the monetary award incidental to, or intertwined with, injunctive relief, because respondents here are seeking only money damages. Moreover, although backpay under Title VII of the Civil Rights Act of 1964 is considered an equitable remedy, this characterization does not require that money damages for breach of the duty of fair representation be considered equitable as well. Congress has specifically characterized Title VII backpay as a form of "equitable relief," but it has made no similar pronouncement regarding damages for breach of the duty of fair representation. Further, this Court has noted that Title VII backpay sought from an employer would generally be restitutionary in nature. Pp. 570–574.

JUSTICE MARSHALL, joined by THE CHIEF JUSTICE, JUSTICE WHITE, and JUSTICE BLACKMUN, concluded in Part III–A:

1. To determine whether a particular action will resolve legal (as opposed to equitable) rights, such that the plaintiff is entitled to a jury trial, courts must examine both the nature of the issues involved and, more importantly, the remedy sought. *Tull* v. *United States*, 481 U. S. 412, 417–418. Pp. 564–565.

2. A comparison of respondents' action to 18th-century causes of action leaves the jury trial question in equipoise, because it reveals that this action presents both equitable and legal issues. The duty of fair representation claim is comparable to an equitable action by a trust beneficiary against a trustee for breach of fiduciary duty. *DelCostello*, *supra*—which, in determining the appropriate statute of limitations in a hybrid action, noted in dicta that an attorney malpractice action, historically an action at law, is the closest state-law analogy to a duty of fair representation claim—did not consider the trust analogy, which more fully captures the relationship between the Union and the represented employees. Nevertheless, respondents' action cannot be characterized as wholly equitable, since the § 301 issue—which respondents must prove in order to prevail—is comparable to a breach of contract claim, a legal issue. *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56. Pp. 565–570.

JUSTICE BRENNAN proposed that the historical test mandated by the Seventh Amendment should turn solely on the comparison of the relief sought to relief historically available in equity or at law, and that the Court should dispense with the process of comparing the right at issue with 18th-century English forms of action. Since the nature of the remedy is always given more weight than the nature of the analogous right, it is unlikely that the proposed analysis would result in different decisions. Comparisons of contemporary rights with ancient writs have needlessly convoluted Seventh Amendment jurisprudence and embroiled courts in recondite controversies better left to legal historians. Moreover, the nature of the rights available under modern statutes is so remote in form and concept from 18th-century forms of action that too often there is no firm basis for comparison. Because the nature of remedies available today corresponds far more directly to the nature of remedies available in Georgian England, the proposed analysis would not only be more manageable than the current test, but also more reliably grounded in history. Pp. 574–581.

JUSTICE STEVENS concluded that the relevant historical question is not whether the suit was specifically recognized at common law, but whether the nature of the substantive right asserted is analogous to common-law rights and whether the relief sought is typical of an action at law. A sufficient basis for the Court's holding is provided by the evolution of the duty of fair representation doctrine through suits tried to juries, the well-recognized duty to scrutinize any proposed curtailment of the right to a jury trial with the utmost care, and the fact that a duty of fair representation action resembles a common-law attorney malpractice action more closely than it does any other action. Pp. 581–584.

MARSHALL, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–B, and IV, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined, and an opinion with respect to Part III–A, in which REHNQUIST, C. J., and WHITE and BLACKMUN, JJ., joined. BRENNAN, J., *post*, p. 574, and STEVENS, J., *post*, p. 581, filed opinions concurring in part and concurring in the judgment. KENNEDY, J., filed a dissenting opinion, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 584.

J. David James argued the cause for petitioner. With him on the briefs were *Walter Kamiat* and *Laurence Gold.*

Robert M. Elliot argued the cause for respondents. With him on the brief was *David C. Pishko.**

**I. Michael Greenberger, Richard M. Wyner*, and *David P. Lee* filed a brief for the National Railway Labor Conference as *amicus curiae* urging reversal.

Paul Alan Levy, Alan B. Morrison, and *Arthur L. Fox II* filed a brief for Teamsters for a Democratic Union as *amicus curiae* urging affirmance.

Peter G. Nash, Dixie L. Atwater, and *Stephen A. Bokat* filed a brief for the Chamber of Commerce of the United States of America as *amicus curiae.*

JUSTICE MARSHALL delivered the opinion of the Court, except as to Part III–A.

This case presents the question whether an employee who seeks relief in the form of backpay for a union's alleged breach of its duty of fair representation has a right to trial by jury. We hold that the Seventh Amendment entitles such a plaintiff to a jury trial.

I

McLean Trucking Company and the Chauffeurs, Teamsters and Helpers Local No. 391 (Union) were parties to a collective-bargaining agreement that governed the terms and conditions of employment at McLean's terminals. The 27 respondents were employed by McLean as truckdrivers in bargaining units covered by the agreement, and all were members of the Union. In 1982 McLean implemented a change in operations that resulted in the elimination of some of its terminals and the reorganization of others. As part of that change, McLean transferred respondents to the terminal located in Winston-Salem and agreed to give them special seniority rights in relation to "inactive" employees in Winston-Salem who had been laid off temporarily.

After working in Winston-Salem for approximately six weeks, respondents were alternately laid off and recalled several times. Respondents filed a grievance with the Union, contesting the order of the layoffs and recalls. Respondents also challenged McLean's policy of stripping any driver who was laid off of his special seniority rights. Respondents claimed that McLean breached the collective-bargaining agreement by giving inactive drivers preference over respondents. After these proceedings, the grievance committee ordered McLean to recall any respondent who was then laid off and to lay off any inactive driver who had been recalled; in addition, the committee ordered McLean to recognize respondents' special seniority rights until the inactive employees were properly recalled.

On the basis of this decision, McLean recalled respondents and laid off the drivers who had been on the inactive list when respondents transferred to Winston-Salem. Soon after this, though, McLean recalled the inactive employees, thereby allowing them to regain seniority rights over respondents. In the next round of layoffs, then, respondents had lower priority than inactive drivers and were laid off first. Accordingly, respondents filed another grievance, alleging that McLean's actions were designed to circumvent the initial decision of the grievance committee. The Union representative appeared before the grievance committee and presented the contentions of respondents and those of the inactive truckdrivers. At the conclusion of the hearing, the committee held that McLean had not violated the committee's first decision.

McLean continued to engage in periodic layoffs and recalls of the workers at the Winston-Salem terminal. Respondents filed a third grievance with the Union, but the Union declined to refer the charges to a grievance committee on the ground that the relevant issues had been determined in the prior proceedings.

In July 1983, respondents filed an action in District Court, alleging that McLean had breached the collective-bargaining agreement in violation of § 301 of the Labor Management Relations Act, 1947, 61 Stat. 156, 29 U. S. C. § 185 (1982 ed.),[1] and that the Union had violated its duty of fair representation. Respondents requested a permanent injunction requiring the defendants to cease their illegal acts and to reinstate them to their proper seniority status; in addition, they sought, *inter alia,* compensatory damages for lost wages and health benefits. In 1986 McLean filed for bankruptcy; subsequently, the action against it was voluntarily dismissed, along with all claims for injunctive relief.

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[1] Section 301(a) of the Labor Management Relations Act, 1947, provides for suits by and against labor unions:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties." 61 Stat. 156, 29 U. S. C. § 185(a) (1982 ed.).

Respondents had requested a jury trial in their pleadings. The Union moved to strike the jury demand on the ground that no right to a jury trial exists in a duty of fair representation suit. The District Court denied the motion to strike. After an interlocutory appeal, the Fourth Circuit affirmed the trial court, holding that the Seventh Amendment entitled respondents to a jury trial of their claim for monetary relief. 863 F. 2d 334 (1988). We granted the petition for certiorari to resolve a Circuit conflict on this issue,[2] 491 U. S. 903 (1989), and now affirm the judgment of the Fourth Circuit.

II

The duty of fair representation is inferred from unions' exclusive authority under the National Labor Relations Act (NLRA), 49 Stat. 449, 29 U. S. C. § 159(a) (1982 ed.), to represent all employees in a bargaining unit. *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967). The duty requires a union "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Ibid.* A union must discharge its duty both in bargaining with the employer and in its enforcement of the resulting collective-bargaining agreement. *Ibid.* Thus, the Union here was required to pursue respondents' grievances in a manner consistent with the principles of fair representation.

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[2] Compare *Leach* v. *Pan American World Airways*, 842 F. 2d 285 (CA11 1988) (no right to a jury trial), with *United Transportation Union, Local 74* v. *Consolidated Rail Corp.*, 881 F. 2d 282 (CA6 1989) (allowing plaintiff the right to a jury trial); *Terry* v. *Chauffeurs, Teamsters and Helpers, Local 391*, 863 F. 2d 334 (CA4 1988) (same); *Quinn* v. *DiGiulian*, 238 U. S. App. D. C. 247, 739 F. 2d 637 (1984) (same); *Roscello* v. *Southwest Airlines Co.*, 726 F. 2d 217 (CA5 1984) (same).

Because most collective-bargaining agreements accord finality to grievance or arbitration procedures established by the collective-bargaining agreement, an employee normally cannot bring a § 301 action against an employer unless he can show that the union breached its duty of fair representation in its handling of his grievance. *DelCostello* v. *Teamsters*, 462 U. S. 151, 163–164 (1983). Whether the employee sues both the labor union and the employer or only one of those entities, he must prove the same two facts to recover money damages: that the employer's action violated the terms of the collective-bargaining agreement and that the union breached its duty of fair representation. *Id.*, at 164–165.

III

We turn now to the constitutional issue presented in this case—whether respondents are entitled to a jury trial.[3] The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." The right to a jury trial includes more than the common-law forms of action recognized in 1791; the phrase "Suits at common law" refers to "suits in which *legal* rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable remedies [are] administered." *Parsons* v. *Bedford*, 3 Pet. 433, 447 (1830); see also *ibid.* ("[T]he amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights"). The right extends to causes of action created by Congress. *Tull* v. *United States*, 481 U. S. 412, 417 (1987). Since the merger of the systems of law and equity, see Fed. Rule Civ. Proc. 2, this Court has carefully preserved the right to trial by jury where legal rights are at stake. As the Court noted in *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500, 501 (1959), "'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care'" (quoting *Dimick* v. *Schiedt*, 293 U. S. 474, 486 (1935)).

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[3] Because the NLRA, 49 Stat. 449, 29 U. S. C. § 159(a) (1982 ed.), does not expressly create the duty of fair representation, resort to the statute to determine whether Congress provided for a jury trial in an action for breach of that duty is unavailing. Cf. *Curtis* v. *Loether*, 415 U. S. 189, 192, n. 6 (1974) (recognizing the "'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the [constitutional] question may be avoided'" (quoting *United States* v. *Thirty-seven Photographs*, 402 U. S. 363, 369 (1971))).

To determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought. "First, we compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity. Second, we examine the remedy sought and determine whether it is legal or equitable in nature." *Tull, supra*, at 417–418 (citations omitted). The second inquiry is the more important in our analysis. *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989).[4]

A

An action for breach of a union's duty of fair representation was unknown in 18th-century England; in fact, collective bargaining was unlawful. See N. Citrine, Trade Union Law 4–7 (2d ed. 1960). We must therefore look for an analogous cause of action that existed in the 18th century to determine whether the nature of this duty of fair representation suit is legal or equitable.

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[4] JUSTICE STEVENS' analysis emphasizes a third consideration, namely whether "the issues [presented by the claim] are typical grist for the jury's judgment." *Post*, at 583. This Court, however, has never relied on this consideration "as an independent basis for extending the right to a jury trial under the Seventh Amendment." *Tull* v. *United States*, 481 U. S. 412, 418, n. 4 (1987). We recently noted that this consideration is relevant only to the determination "whether Congress has permissibly entrusted the resolution of certain disputes to an administrative agency or specialized court of equity, and whether jury trials would impair the functioning of the legislative scheme." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S., at 42, n. 4. No one disputes that an action for breach of the duty of fair representation may properly be brought in an Article III court; thus, the factor does not affect our analysis.

The Union contends that this duty of fair representation action resembles a suit brought to vacate an arbitration award because respondents seek to set aside the result of the grievance process. In the 18th century, an action to set aside an arbitration award was considered equitable. 2 J. Story, Commentaries on Equity Jurisprudence § 1452, pp. 789–790 (13th ed. 1886) (equity courts had jurisdiction over claims that an award should be set aside on the ground of "mistake of the arbitrators"); see, *e. g.*, *Burchell* v. *Marsh*, 17 How. 344 (1855) (reviewing bill in equity to vacate an arbitration award). In support of its characterization of the duty of fair representation claim, the Union cites *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56 (1981), in which we held that, for purposes of selecting from various state statutes an appropriate limitations period for a § 301 suit against an employer, such a suit was more analogous to a suit to vacate an arbitration award than to a breach of contract action. *Id.*, at 62.[5]

The arbitration analogy is inapposite, however, to the Seventh Amendment question posed in this case. No grievance committee has considered respondents' claim that the Union violated its duty of fair representation; the grievance process was concerned only with the employer's alleged breach of the collective-bargaining agreement. Thus, respondents' claim against the Union cannot be characterized as an action to vacate an arbitration award because "'[t]he arbitration proceeding did not, and indeed, could not, resolve the employee's claim against the union. . . . Because no arbitrator has decided the primary issue presented by this claim, no arbitration award need be undone, even if the employee ultimately prevails.'" *DelCostello*, 462 U. S., at 167 (quoting *Mitchell*, *supra*, at 73 (STEVENS, J., concurring in part and dissenting in part) (footnotes omitted)).

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[5] We later abandoned the reliance on state statutes of limitations for § 301 actions, and instead applied the federal limitations period for unfair labor practice charges, § 10(b) of the NLRA, 49 Stat. 453, as amended, 29 U. S. C. § 160(b) (1982 ed.), to both a § 301 claim against an employer and a duty of fair representation claim against a union. *DelCostello* v. *Teamsters*, 462 U. S. 151 (1983).

The Union next argues that respondents' duty of fair representation action is comparable to an action by a trust beneficiary against a trustee for breach of fiduciary duty. Such actions were within the exclusive jurisdiction of courts of equity. 2 Story, *supra*, § 960, p. 266; Restatement (Second) of Trusts § 199(c) (1959). This analogy is far more persuasive than the arbitration analogy. Just as a trustee must act in the best interests of the beneficiaries, 2A W. Fratcher, Scott on Trusts § 170 (4th ed. 1987), a union, as the exclusive representative of the workers, must exercise its power to act on behalf of the employees in good faith, *Vaca* v. *Sipes*, 386 U. S., at 177. Moreover, just as a beneficiary does not directly control the actions of a trustee, 3 Fratcher, *supra*, § 187, an individual employee lacks direct control over a union's actions taken on his behalf, see Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 21 (1958).

The trust analogy extends to a union's handling of grievances. In most cases, a trustee has the exclusive authority to sue third parties who injure the beneficiaries' interest in the trust, 4 Fratcher, *supra*, § 282, pp. 25–29, including any legal claim the trustee holds in trust for the beneficiaries, Restatement (Second) of Trusts, *supra*, § 82, comment *a*. The trustee then has the sole responsibility for determining whether to settle, arbitrate, or otherwise dispose of the claim. Restatement (Second) of Trusts, *supra*, § 192. Similarly, the union typically has broad discretion in its decision whether and how to pursue an employee's grievance against an employer. See, *e. g.*, *Vaca* v. *Sipes*, *supra*, at 185. Just as a trust beneficiary can sue to enforce a contract entered into on his behalf by the trustee only if the trustee "improperly refuses or neglects to bring an action against the third person," Restatement (Second) of Trusts, *supra*, § 282(2), so an employee can sue his employer for a breach of the collective-bargaining agreement only if he shows that the union breached its duty of fair representation in its handling of the grievance, *DelCostello*, *supra*, at 163–164. See *Bowen* v. *United States Postal Service*, 459 U. S. 212, 243 (1983) (WHITE, J., concurring in judgment in part and dissenting in part).

Respondents contend that their duty of fair representation suit is less like a trust action than an attorney malpractice action, which was historically an action at law, see, *e. g.*, *Russell* v. *Palmer*, 2 Wils. K. B. 325, 95 Eng. Rep. 837 (1767). In determining the appropriate statute of limitations for a hybrid § 301/duty of fair representation action, this Court in *DelCostello* noted in dictum that an attorney malpractice action is "the closest state-law analogy for the claim against the union." 462 U. S., at 167. The Court in *DelCostello* did not consider the trust analogy, however. Presented with a more complete range of alternatives, we find that, in the context of the Seventh Amendment inquiry, the attorney malpractice analogy does not capture the relationship between the union and the represented employees as fully as the trust analogy does.

The attorney malpractice analogy is inadequate in several respects. Although an attorney malpractice suit is in some ways similar to a suit alleging a union's breach of its fiduciary duty, the two actions are fundamentally different. The nature of an action is in large part controlled by the nature of the underlying relationship between the parties. Unlike employees represented by a union, a client controls the significant decisions concerning his representation. Moreover, a client can fire his attorney if he is dissatisfied with his attorney's performance. This option is not available to an individual employee who is unhappy with a union's representation, unless a majority of the members of the bargaining unit share his dissatisfaction. See *J. I. Case Co.* v. *NLRB*, 321 U. S. 332, 338–339 (1944). Thus, we find the malpractice analogy less convincing than the trust analogy.

Nevertheless, the trust analogy does not persuade us to characterize respondents' claim as wholly equitable. The Union's argument mischaracterizes the nature of our comparison of the action before us to 18th-century forms of action. As we observed in *Ross* v. *Bernhard*, 396 U. S. 531 (1970), "The Seventh Amendment question depends on the nature of the *issue* to be tried rather than the character of the overall action." *Id.*, at 538 (emphasis added) (finding a right to jury trial in a shareholder's derivative suit, a type of suit traditionally brought in courts of equity, because plaintiffs' case presented legal issues of breach of contract and negligence). As discussed above, see *supra*, at 564, to recover from the Union here, respondents must prove both that McLean violated § 301 by breaching the collective-bargaining agreement and that the Union breached its duty of fair representation.[6] When viewed in isolation, the duty of fair representation issue is analogous to a claim against a trustee for breach of fiduciary duty. The § 301 issue, however, is comparable to a breach of contract claim—a legal issue.[7]

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[6] The dissent characterizes this opinion as "pars[ing] legal elements out of equitable claims." *Post*, at 590. The question whether the Seventh Amendment analysis requires an examination of the nature of each element of a typical claim is not presented by this case. The claim we confront here is not typical; instead, it is a claim consisting of discrete issues that would normally be brought as two claims, one against the employer and one against the union. Had the employer remained a defendant in this action, the dissent would surely agree that the § 301 claim against the employer was a separate claim. The Seventh Amendment analysis should not turn on the ability of the plaintiff to maintain his suit against both defendants, when the issues in the suit remain the same even when he can sue only the union. Consideration of the nature of the two issues in this hybrid action is therefore warranted.

Respondents' action against the Union thus encompasses both equitable and legal issues. The first part of our Seventh Amendment inquiry, then, leaves us in equipoise as to whether respondents are entitled to a jury trial.

B

Our determination under the first part of the Seventh Amendment analysis is only preliminary. *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S., at 47. In this case, the only remedy sought is a request for compensatory damages representing backpay and benefits. Generally, an action for money damages was "the traditional form of relief offered in the courts of law." *Curtis* v. *Loether*, 415 U. S. 189, 196 (1974). This Court has not, however, held that "any award of monetary relief must *necessarily* be 'legal' relief." *Ibid.* (emphasis added). See also *Granfinanciera*, *supra*, at 86, n. 9 (WHITE, J., dissenting). Nonetheless, because we conclude that the remedy respondents seek has none of the attributes that must be present before we will find an exception to the general rule and characterize damages as equitable, we find that the remedy sought by respondents is legal.

First, we have characterized damages as equitable where they are restitutionary, such as in "action[s] for disgorgement of improper profits," *Tull*, 481 U. S., at 424. See also *Curtis* v. *Loether*, *supra*, at 197; *Porter* v. *Warner Holding Co.*, 328 U. S. 395, 402 (1946). The backpay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from McLean had the Union processed the employees' grievances properly. Such relief is not restitutionary.

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[7] In *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56 (1981), we found a § 301 action against the employer more analogous to a suit to set aside an arbitration award than to a breach of contract suit because the employee, to overturn the grievance committee's decision, had to prove that the union violated its duty of fair representation. *Id.*, at 62. In that case, we analyzed the action as a whole; in this case, however, the Seventh Amendment requires that we treat each issue separately. When considered by itself, the § 301 issue is closely analogous to a breach of contract claim.

Second, a monetary award "incidental to or intertwined with injunctive relief" may be equitable. *Tull*, *supra*, at 424. See, *e. g.*, *Mitchell* v. *Robert DeMario Jewelry, Inc.*, 361 U. S. 288, 291–292 (1960) (District Court had power, incident to its injunctive powers, to award backpay under the Fair Labor Standards Act; also backpay in that case was restitutionary). Because respondents seek only money damages, this characteristic is clearly absent from the case.[8]

The Union argues that the backpay relief sought here must nonetheless be considered equitable because this Court has labeled backpay awarded under Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e *et seq.* (1982 ed.), as equitable. See *Albemarle Paper Co.* v. *Moody*, 422 U. S. 405, 415–418 (1975) (characterizing backpay awarded against employer under Title VII as equitable in context of assessing whether judge erred in refusing to award such relief). It contends that the Title VII analogy is compelling in the context of the duty of fair representation because the Title VII backpay provision was based on the NLRA provision governing backpay awards for unfair labor practices, 29 U. S. C. § 160(c) (1982 ed.) ("[W]here an order directs reinstatement of an employee, back pay may be required of the employer or labor organization"). See *Albemarle Paper Co.* v. *Moody*, *supra*, at 419. We are not convinced.

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[8] Both the Union and the dissent argue that the backpay award sought here is equitable because it is closely analogous to damages awarded to beneficiaries for a trustee's breach of trust. See *post*, at 587. Such damages were available only in courts of equity because those courts had exclusive jurisdiction over actions involving a trustee's breach of his fiduciary duties. See 3 W. Fratcher, Scott on Trusts § 205, p. 240 (4th ed. 1987); Restatement (Second) of Trusts § 205(a), and comment *c*, illustration 2 (1959).

The Union's argument, however, conflates the two parts of our Seventh Amendment inquiry. Under the dissent's approach, if the action at issue were analogous to an 18th-century action within the exclusive jurisdiction of the courts of equity, we would necessarily conclude that the remedy sought was also equitable because it would have been unavailable in a court of law. This view would, in effect, make the first part of our inquiry dispositive. We have clearly held, however, that the second part of the inquiry—the nature of the relief—is more important to the Seventh Amendment determination. See *supra*, at 565. The second part of the analysis, therefore, should not replicate the "abstruse historical" inquiry of the first part, *Ross* v. *Bernhard*, 396 U. S. 531, 538, n. 10 (1970), but requires consideration of the general types of relief provided by courts of law and equity.

The Court has never held that a plaintiff seeking backpay under Title VII has a right to a jury trial. See *Lorillard* v. *Pons*, 434 U. S. 575, 581–582 (1978). Assuming, without deciding, that such a Title VII plaintiff has no right to a jury trial, the Union's argument does not persuade us that respondents are not entitled to a jury trial here. Congress specifically characterized backpay under Title VII as a form of "equitable relief." 42 U. S. C. § 2000e–5(g) (1982 ed.) ("[T]he court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . , or any other equitable relief as the court deems appropriate"). See also *Curtis* v. *Loether*, *supra*, at 196–197 (distinguishing backpay under Title VII from damages under Title VIII, the fair housing provision of the Civil Right Act, 42 U. S. C. §§ 3601–3619 (1982 ed.), which the Court characterized as "legal" for Seventh Amendment purposes). Congress made no similar pronouncement regarding the duty of fair representation. Furthermore, the Court has noted that backpay sought from an employer under Title VII would generally be restitutionary in nature, see *Curtis* v. *Loether*, *supra*, at 197, in contrast to the damages sought here from the Union. Thus, the remedy sought in this duty of fair representation case is clearly different from backpay sought for violations of Title VII.

Moreover, the fact that Title VII's backpay provision may have been modeled on a provision in the NLRA concerning remedies for unfair labor practices does not require that the backpay remedy available here be considered equitable. The Union apparently reasons that if Title VII is comparable to one labor law remedy it is comparable to all remedies available in the NLRA context. Although both the duty of fair representation and the unfair labor practice provisions of the NLRA are components of national labor policy, their purposes are not identical. Unlike the unfair labor practice provisions of the NLRA, which are concerned primarily with the public interest in effecting federal labor policy, the duty of fair representation targets "'the wrong done the individual employee.'" *Electrical Workers* v. *Foust*, 442 U. S. 42, 49, n. 12 (1979) (quoting *Vaca* v. *Sipes*, 386 U. S., at 182, n. 8) (emphasis deleted). Thus, the remedies appropriate for unfair labor practices may differ from the remedies for a breach of the duty of fair representation, given the need to vindicate different goals. Certainly, the connection between backpay under Title VII and damages under the unfair labor practice provision of the NLRA does not require us to find a parallel connection between Title VII backpay and money damages for breach of the duty of fair representation.

We hold, then, that the remedy of backpay sought in this duty of fair representation action is legal in nature. Considering both parts of the Seventh Amendment inquiry, we find that respondents are entitled to a jury trial on all issues presented in their suit.

IV

On balance, our analysis of the nature of respondents' duty of fair representation action and the remedy they seek convinces us that this action is a legal one. Although the search for an adequate 18th-century analog revealed that the claim includes both legal and equitable issues, the money damages respondents seek are the type of relief traditionally awarded by courts of law. Thus, the Seventh Amendment entitles respondents to a jury trial, and we therefore affirm the judgment of the Court of Appeals.

It is so ordered.

JUSTICE BRENNAN, concurring in part and concurring in the judgment.

I agree with the Court that respondents seek a remedy that is legal in nature and that the Seventh Amendment entitles respondents to a jury trial on their duty of fair representation claims. I therefore join Parts I, II, III–B, and IV of the Court's opinion. I do not join that part of the opinion which reprises the particular historical analysis this Court has employed to determine whether a claim is a "Sui[t] at common law" under the Seventh Amendment, *ante*, at 564, because I believe the historical test can and should be simplified.

The current test, first expounded in *Curtis* v. *Loether*, 415 U. S. 189, 194 (1974), requires a court to compare the right at issue to 18th-century English forms of action to determine whether the historically analogous right was vindicated in an action at law or in equity, and to examine whether the remedy sought is legal or equitable in nature. However, this Court, in expounding the test, has repeatedly discounted the significance of the analogous form of action for deciding where the Seventh Amendment applies. I think it is time we dispense with it altogether.[1] I would decide Seventh Amendment questions on the basis of the relief sought. If the relief is legal in nature, *i. e.*, if it is the kind of relief that historically was available from courts of law, I would hold that the parties have a constitutional right to a trial by jury—unless Congress has permissibly delegated the particular dispute to a non-Article III decisionmaker and jury trials would frustrate Congress' purposes in enacting a particular statutory scheme.[2]

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[1] I therefore also do not join Part III–A of JUSTICE MARSHALL's opinion because it considers which 18th-century actions are comparable to the modern-day statutory claim brought here.

I believe that our insistence that the jury trial right hinges in part on a comparison of the substantive right at issue to forms of action used in English courts 200 years ago needlessly convolutes our Seventh Amendment jurisprudence. For the past decade and a half, this Court has explained that the two parts of the historical test are not equal in weight, that the nature of the remedy is more important than the nature of the right. See *ante*, at 565; *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989); *Tull* v. *United States*, 481 U. S. 412, 421 (1987); *Curtis* v. *Loether*, *supra*, at 196. Since the existence of a right to jury trial therefore turns on the nature of the remedy, absent congressional delegation to a specialized decisionmaker,[3] there remains little purpose to our rattling through dusty attics of ancient writs. The time has come to borrow William of Occam's razor and sever this portion of our analysis.

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[2] As the majority notes, *ante*, at 565, n. 4, where Congress has delegated a particular claim to an administrative agency or specialized court of equity, a court must consider whether the delegation is a permissible one and "whether jury trials would impair the functioning of the legislative scheme." *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42, n. 4 (1989). These questions are not implicated in this case, as it is undisputed that an action for breach of the duty of fair representation may be brought in an Article III court. *Ante*, at 565, n. 4.

[3] Even where Congress has assigned resolution of a dispute to a specialized forum, the right to a jury trial does not turn on whether the analogous 18th-century action was legal or equitable. As we explained in *Granfinanciera, S. A.*, *supra*, at 42 and n. 4, a court first looks to the analogous historical form of action and the nature of the relief sought, alloting greater weight to the nature of the relief. If this inquiry leads the court to conclude that the party is entitled to a jury trial, the court must consider whether the party is asserting a public right or private right—a distinction contingent on the government's role in creating the right, see 492 U. S., at 42, n. 4—and whether jury trials would impair the functioning of the legislative scheme. The result of the search for a historical analog is subordinate to the nature of the relief sought and irrelevant to the subsequent inquiry.

We have long acknowledged that, of the factors relevant to the jury trial right, comparison of the claim to ancient forms of action, "requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply." *Ross* v. *Bernhard*, 396 U. S. 531, 538, n. 10 (1970). Requiring judges, with neither the training nor time necessary for reputable historical scholarship, to root through the tangle of primary and secondary sources to determine which of a hundred or so writs is analogous to the right at issue has embroiled courts in recondite controversies better left to legal historians. For example, in *Granfinanciera, S. A.*, *supra*, decided last Term, both JUSTICE WHITE, in dissent, and I, writing for the Court, struggled with the question whether an equity court would have heard the suit that was comparable to the modern statutory action at issue. I quoted Professor Garrard Glenn. *Id.*, at 44. JUSTICE WHITE countered that "[o]ther scholars have looked at the same history and come to a different conclusion. Still others have questioned the soundness of the distinction that Professor Glenn drew . . . . Trying to read the ambiguous history concerning fraudulent conveyance actions in equity . . . has perplexed jurists in each era, who have come to conflicting decisions each time that the question has found relevance." *Id.*, at 85 (footnote omitted). I countered with an item-by-item evaluation of JUSTICE WHITE's sources. See *id.*, at 47, n. 6.[4]

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[4] The lower courts have not had an easier time of it. In *Damsky* v. *Zavatt*, 289 F. 2d 46 (CA2 1961), Judge Friendly, writing for the majority, admitted that his exegesis of the history of the Court of Exchequer from the 12th to the 18th century "may seem to reek unduly of the study." *Id.*, at 48. Judge Clark, in dissent, quipped " 'if not of the museum,' " *id.*, at 59, and denounced the majority for constructing its argument of "unreal and unjustified" steps beginning with the attachment to the claim of "an inapt label, namely, that of the writ of debt," which "as set forth, say, in Chitty" did not look to Judge Clark like the modern statutory tax claims at issue. *Ibid.* He called this a "venture in nomenclature" and berated the majority for its fast reliance on "somewhat uncertain history" as well. *Ibid.*

To be sure, it is neither unusual nor embarrassing for members of a court to disagree and disagree vehemently. But it better behooves judges to disagree within the province of judicial expertise. Furthermore, inquiries into the appropriate historical analogs for the rights at issue are not necessarily susceptible of sound resolution under the best of circumstances. As one scholar observes: "[T]he line between law and equity (and therefore between jury and non-jury trial) was not a fixed and static one. There was a continual process of borrowing by one jurisdiction from the other; there were less frequent instances of a sloughing off of older functions. . . . The borrowing by each jurisdiction from the other was not accompanied by an equivalent sloughing off of functions. This led to a very large overlap between law and equity." James, Right to a Jury Trial in Civil Actions, 72 Yale L. J. 655, 658–659 (1963).

In addition, modern statutory rights did not exist in the 18th century, and even the most exacting historical research may not elicit a clear historical analog.[5] The right at issue here, for example, is a creature of modern labor law quite foreign to Georgian England. See *ante*, at 565–566. Justice Stewart recognized the perplexities involved in this task in his dissent in *Ross* v. *Bernhard, supra*, at 550, albeit drawing a different conclusion. "The fact is," he said, "that there are, for the most part, no such things as inherently 'legal issues' or inherently 'equitable issues.' There are only factual issues, and, 'like chameleons [they] take their color from surrounding circumstances.' Thus, the Court's 'nature of the issue' approach is hardly meaningful."[6] I have grappled with this kind of inquiry for three decades on this Court and have come to the realization that engaging in such inquiries is impracticable and unilluminating.

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[5] See also McCoid, Procedural Reform and the Right to Jury Trial: A Study of *Beacon Theatres, Inc.* v. *Westover*, 116 U. Pa. L. Rev. 1, 2 (1967) ("[C]omplications stem from historical shifts and overlapping jurisdiction. Moreover, the careful historian encounters difficulty in applying the fruits of his study to contemporary civil litigation involving subject matter and procedural patterns unused, and sometimes unknown, in 1791") (footnotes omitted).

To rest the historical test required by the Seventh Amendment solely on the nature of the relief sought would not, of course, offer the federal courts a rule that is in all cases self-executing. Courts will still be required to ask which remedies were traditionally available at law and which only in equity. But this inquiry involves fewer variables and simpler choices, on the whole, and is far more manageable than the scholasticist debates in which we have been engaged. Moreover, the rule I propose would remain true to the Seventh Amendment, as it is undisputed that, historically, "[j]urisdictional lines [between law and equity] were primarily a matter of remedy." McCoid, Procedural Reform and the Right to Jury Trial: A Study of *Beacon Theatres, Inc.* v. *Westover*, 116 U. Pa. L. Rev. 1 (1967). See also Redish, Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making, 70 Nw. U. L. Rev. 486, 490 (1975) ("In the majority of cases at common law, the equitable or legal nature of a suit was determined not by the substantive nature of the cause of action but by the remedy sought").[7]

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[6] Quoting James, Right to a Jury Trial in Civil Actions, 72 Yale L. J. 655, 692 (1963).

[7] There are, to be sure, some who advocate abolishing the historical test altogether. See, *e. g.*, Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 742–747 (1973). Contrary to the intimations in JUSTICE KENNEDY's dissent, see *post*, at 592–594, I am not among them. I believe that it is imperative to retain a historical test for determining when parties have a right to jury trial for precisely the same reasons JUSTICE KENNEDY does. It is mandated by the language of the Seventh Amendment and it is a bulwark against those who would restrict a right our forefathers held indispensable. Like JUSTICE KENNEDY, I have no doubt that courts can and do look to legal history for the answers to

This is not to say that the resulting division between claims entitled to jury trials and claims not so entitled would exactly mirror the division between law and equity in England in 1791. But it is too late in the day for this Court to profess that the Seventh Amendment preserves the right to jury trial only in cases that would have been heard in the British law courts of the 18th century. See, *e. g., Curtis* v. *Loether*, 415 U. S., at 193 ("Although the thrust of the Amendment was to preserve the right to jury trial as it existed in 1791, it has long been settled that the right extends beyond the common-law forms of action recognized at that time"); *Beacon Theatres, Inc.* v. *Westover*, 359 U. S. 500 (1959) (rejecting the relevance of the chancellor's historic ability to decide legal claims incidental to a case brought in equity and holding that, in mixed cases, the parties are not only entitled to a jury trial on the legal claims but that this jury trial must precede a decision on the equitable claims—with the attendant collateral-estoppel effects); *Ross* v. *Bernhard*, 396 U. S. 531 (1970) (requiring a jury trial on the legal issues in a share-

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constitutional questions, see *post*, at 593–594, and therefore the Seventh Amendment test I propose today obliges courts to do exactly that.

Where JUSTICE KENNEDY and I differ is in our evaluations of which historical test provides the more reliable results. That three learned Justices of the Supreme Court cannot arrive at the same conclusion in this very case, on what is essentially a question of fact, does not speak well for the judicial solvency of the current test. My concern is not merely the competence of courts to delve into this peculiarly recalcitrant aspect of legal history and certainly not, as JUSTICE KENNEDY summarizes it, the "competence of the Court to understand legal history" in general. *Post*, at 594. My concern is that all too often the first prong of the current test requires courts to measure modern statutory actions against 18th-century English actions so remote in form and concept that there is no firm basis for comparison. In such cases, the result is less the discovery of a historical analog than the manufacture of a historical fiction. By contrast, the nature of relief available today corresponds more directly to the nature of relief available in Georgian England. Thus the historical test I propose, focusing on the nature of the relief sought, is not only more manageable than the current test, it is more reliably grounded in history.

holders' derivative suit even though the procedurally equivalent suit in the 18th century would have been heard only in equity).

Indeed, given this Court's repeated insistence that the nature of the remedy is always to be given more weight than the nature of the historically analogous right, it is unlikely that the simplified Seventh Amendment analysis I propose will result in different decisions than the analysis in current use. In the unusual circumstance that the nature of the remedy could be characterized equally as legal or equitable, I submit that the comparison of a contemporary statutory action unheard of in the 18th century to some ill-fitting ancient writ is too shaky a basis for the resolution of an issue as significant as the availability of a trial by jury. If, in the rare case, a tie breaker is needed, let us break the tie in favor of jury trial.[8]

What Blackstone described as "the glory of the English law" and "the most transcendent privilege which any subject can enjoy," 3 W. Blackstone, Commentaries *379, was crucial in the eyes of those who founded this country. The encroachment on civil jury trial by colonial administrators was a "deeply divisive issue in the years just preceding the outbreak of hostilities between the colonies and England," and all 13 States reinstituted the right after hostilities ensued. Wolfram, The Constitutional History of the Seventh Amendment, 57 Minn. L. Rev. 639, 654–655 (1973). "In fact, '[t]he right to trial by jury was probably the only one universally secured by the first American constitutions.'" *Id.*, at 655 (quoting L. Levy, Freedom of Speech and Press in Early American History—Legacy of Suppression 281 (1963 reprint)). Fear of a Federal Government that had not guaranteed jury trial in civil cases, voiced first at the Philadelphia Convention in 1787 and regularly during the ratification debates, was the concern that precipitated the maelstrom over the need for a bill of rights in the United States Constitution. Wolfram, *supra*, at 657–660.

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[8] See also *Granfinanciera, S. A.*, 492 U. S., at 92 (BLACKMUN, J., dissenting) ("The uncertainty in the historical record should lead us, for purposes of the present inquiry, to give the constitutional right to a jury trial the benefit of the doubt").

This Court has long recognized the caliber of this right. In *Parsons* v. *Bedford*, 3 Pet. 433, 446 (1830), Justice Story stressed: "The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy." Similarly, in *Jacob* v. *New York City*, 315 U. S. 752, 752–753 (1942), we said that "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence . . . [a] right so fundamental and sacred to the citizen [that it] should be jealously guarded by the courts."

We can guard this right and save our courts from needless and intractable excursions into increasingly unfamiliar territory simply by retiring that prong of our Seventh Amendment test which we have already cast into a certain doubt. If we are not prepared to accord the nature of the historical analog sufficient weight for this factor to affect the outcome of our inquiry, except in the rarest of hypothetical cases, what reason do we have for insisting that federal judges proceed with this arduous inquiry? It is time we read the writing on the wall, especially as we ourselves put it there.

JUSTICE STEVENS, concurring in part and concurring in the judgment.

Because I believe the Court has made this case unnecessarily difficult by exaggerating the importance of finding a precise common-law analogue to the duty of fair representation, I do not join Part III–A of its opinion. Ironically, by stressing the importance of identifying an exact analogue, the Court has diminished the utility of looking for any analogue.

As I have suggested in the past, I believe the duty of fair representation action resembles a common-law action against an attorney for malpractice more closely than it does any other form of action. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 74 (1981) (opinion concurring in part and dissenting in part). Of course, this action is not an exact counterpart to a malpractice suit. Indeed, by definition, no recently recognized form of action—whether the product of express congressional enactment or of judicial interpretation—can have a precise analog in 17th- or 18th-century English law. Were it otherwise the form of action would not in fact be "recently recognized."

But the Court surely overstates this action's similarity to an action against a trustee. Collective bargaining involves no settlor, no trust corpus, and no trust instrument executed to convey property to beneficiaries chosen at the settlor's pleasure. Nor are these distinctions reified matters of pure form. The law of trusts originated to expand the varieties of land ownership in feudal England, and evolved to protect the paternalistic beneficence of the wealthy, often between generations and always over time. See 1 W. Fratcher, Scott on Trusts § 1 (4th ed. 1987); L. Friedman, A History of American Law 212, 222–223 (1973). Beneficiaries are protected from their own judgment.[1] The attorney-client relationship, by contrast, advances the client's interests in dealings with adverse parties. Clients are saved from their lack of skill, but their judgment is honored. Union members, as a group, accordingly have the power to hire, fire, and direct the actions of their representatives—prerogatives anathema to the paternalistic forms of the equitable trust.[2]

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[1] "The duties of the trustee are such as the creator of the trust may choose to impose; the interests of the beneficiaries are such as he may choose to confer upon them." 1 Fratcher, Scott on Trusts § 1, p. 2.

[2] Indeed, to make sense of the trust analogy, the majority must apparently be willing to assume that the union members, considered collectively, are both beneficiary and settlor, and that the settlor retains considerable

Equitable reasoning calibrated by the sophisticated judgment of the jurist, the accountant, and the chancellor is thus appropriately invoked when the impact of a trustee's conduct on the future interests of contingent remaindermen must be reviewed. However, the commonsense understanding of the jury, selected to represent the community, is appropriately invoked when disputes in the factory, the warehouse, and the garage must be resolved. In most duty of fair representation cases, the issues, which require an understanding of the realities of employment relationships, are typical grist for the jury's judgment. Indeed, the law defining the union's duty of fair representation has developed in cases tried to juries. Thus, *Vaca* v. *Sipes*, 386 U. S. 171 (1967), was itself a jury trial as were, for example, *Electrical Workers* v. *Foust*, 442 U. S. 42 (1979), and *Bowen* v. *United States Postal Service*, 459 U. S. 212 (1983).

As the Court correctly observed in *Curtis* v. *Loether*, 415 U. S. 189, 195 (1974), "in an ordinary civil action in the district courts, where there is obviously no functional justification for denying the jury trial right, a jury trial must be available if the action involves rights and remedies of the sort typically enforced in an action at law." As I had occasion to remark at an earlier proceeding in the same case, the relevant historical question is not whether a suit was "specifically recognized at common law," but whether "the nature of the substantive right asserted . . . is analogous to common law rights" and whether the relief sought is "typical of an action at law." *Rogers* v. *Loether*, 467 F. 2d 1110, 1116–1117 (CA7 1972). Duty of fair representation suits are for the most part ordinary civil actions involving the stuff of contract and malpractice disputes. There is accordingly no ground for excluding these actions from the jury right.

In my view, the evolution of this doctrine through suits tried to juries, the useful analogy to common-law malpractice

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power over the corpus, including the power to revoke the trust. That is an odd sort of trust.

cases, and the well-recognized duty to scrutinize any proposed curtailment of the right to a jury trial "with the utmost care," *ante*, at 565, provide a plainly sufficient basis for the Court's holding today. I therefore join its judgment and all of its opinion except for Part III-A.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, dissenting.

This case asks whether the Seventh Amendment guarantees the respondent union members a jury trial in a duty of fair representation action against their labor union. The Court is quite correct, in my view, in its formulation of the initial premises that must govern the case. Under *Curtis* v. *Loether*, 415 U. S. 189, 194 (1974), the right to a jury trial in a statutory action depends on the presence of "legal rights and remedies." To determine whether rights and remedies in a duty of fair representation action are legal in character, we must compare the action to the 18th-century cases permitted in the law courts of England, and we must examine the nature of the relief sought. See *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33, 42 (1989). I agree also with those Members of the Court who find that the duty of fair representation action resembles an equitable trust action more than a suit for malpractice. See *ante*, at 568-569.

I disagree with the analytic innovation of the Court that identification of the trust action as a model for modern duty of fair representation actions is insufficient to decide the case. The Seventh Amendment requires us to determine whether the duty of fair representation action "is more similar to cases that were tried in courts of law than to suits tried in courts of equity." *Tull* v. *United States*, 481 U. S. 412, 417 (1987). Having made this decision in favor of an equitable action, our inquiry should end. Because the Court disagrees with this proposition, I dissent.

I

Both the Union and the respondents identify historical actions to which they find the duty of fair representation action most analogous. The Union contends that the action resembles a traditional equitable suit by a beneficiary against a trustee for failing to pursue a claim that he holds in trust. See, *e. g.*, *Caffrey* v. *Darby*, 6 Ves. Jun. 489, 495–496, 31 Eng. Rep. 1159, 1162 (Ch. 1801); Restatement (Second) of Trusts § 205(a), and Illustration 2, pp. 458, 459 (1957) (Restatement). In other words, the Union compares itself to a trustee that, in its discretion, has decided not to press certain claims. The respondents argue that the duty of fair representation action resembles a traditional legal malpractice suit by a client against his lawyer for mishandling a claim. See, *e. g.*, *Pitt* v. *Yalden*, 4 Burr. 2060, 98 Eng. Rep. 74 (K. B. 1767); *Russell* v. *Palmer*, 2 Wils. K. B. 325, 95 Eng. Rep. 837 (1767). They contend that the Union, when acting as their legal representative, had a duty to press their grievances.

JUSTICE MARSHALL, speaking for four Members of the Court, states an important and correct reason for finding the trust model better than the malpractice analogy. He observes that the client of an attorney, unlike a union member or beneficiary, controls the significant decisions concerning his litigation and can fire the attorney if not satisfied. See *ante*, at 568–569. Put another way, although a lawyer acts as an agent of his client, unions and trustees do not serve as agents of their members and beneficiaries in the conventional sense of being subject to their direction and control in pursuing claims. An individual union member cannot require his union to pursue a claim and cannot choose a different representative. See 29 U. S. C. § 159(a) (1982 ed.) (making the union elected by the employees in a bargaining unit the exclusive representative); *Vaca* v. *Sipes*, 386 U. S. 171, 177 (1967) (allowing a union to exercise discretion in fulfilling its duty of fair representation). A trustee, likewise, may exercise proper discretion in deciding whether to press claims held in trust, see *Blue* v. *Marshall,* 3 P. Wms. 381, 383–384, 24 Eng. Rep. 1110, 1111 (Ch. 1735); Restatement, *supra,* § 192, and in general does not act as an agent of his beneficiaries, see *Taylor* v. *Davis,* 110 U. S. 330, 334–335 (1884) ("A trustee is not an agent. An agent represents and acts for his principal . . . . [A trustee] has no principal"); 1 A. Scott, Law of Trusts § 8, pp. 74–79 (3d ed. 1967) (distinguishing trustees from agents).

Further considerations fortify the conclusion that the trust analogy is the controlling one here. A union's duty of fair representation accords with a trustee's duty of impartiality. The duty of fair representation requires a union "to make an honest effort to serve the interests of all of [its] members, without hostility to any." *Ford Motor Co.* v. *Huffman,* 345 U. S. 330, 337 (1953). This standard may require a union to act for the benefit of employees who, as in this case, have antithetical interests. See Cox, The Legal Nature of Collective Bargaining Agreements, 57 Mich. L. Rev. 1, 21 (1958). Trust law, in a similar manner, long has required trustees to serve the interests of all beneficiaries with impartiality. See *Stuart* v. *Stuart,* 3 Beav. 430, 431, 49 Eng. Rep. 169, 169–170 (1841); Restatement, *supra,* § 183 ("When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them"); 2 Scott, *supra,* § 183, pp. 1471–1472, and n. 2.

A lawyer's duty of loyalty is cast in different terms. Although the union is charged with the responsibility of reconciling the positions of its members, the lawyer's duty of loyalty long has precluded the representation of conflicting interests. See *Williams* v. *Reed,* 29 F. Cas. 1386, 1390 (No. 17,733) (CC Me. 1824) (Story, J.); H. Drinker, Legal Ethics 103 (1953) (describing the ancient history of the prohibition on simultaneous representation). A lawyer, at least absent knowing waiver by the parties, could not represent both the respondents and the senior laidoff workers as the

Union has done in this case. Cf. ABA Model Rules of Professional Conduct 1.7(b) (1984); ABA Model Code of Professional Responsibility DR 5–105(C) (1980).

The relief available in a duty of fair representation action also makes the trust action the better model. To remedy a breach of the duty of fair representation, a court must issue an award "fashioned to make the injured employee whole." *Electrical Workers* v. *Foust*, 442 U. S. 42, 49 (1979); see *Steele* v. *Louisville & Nashville R. Co.*, 323 U. S. 192, 206–207 (1944); *Vaca* v. *Sipes*, *supra*, at 187. The court may order an injunction compelling the union, if it is still able, to pursue the employee's claim, and may require monetary compensation, but it cannot award exemplary or punitive damages. See *Foust*, *supra*, at 52. This relief parallels the remedies prevailing in the courts of equity in actions against trustees for failing to pursue claims. See, *e. g.*, *Caffrey* v. *Darby*, *supra*, at 497, 31 Eng. Rep., at 1163 (ordering the trustee to make a beneficiary whole for failing to make a timely claims); see also Restatement, *supra*, § 205, and Comment *a;* G. Bogert & G. Bogert, Law of Trusts and Trustees § 862, p. 40, n. 10 (rev. 2d ed. 1982).

These remedies differ somewhat from those available in attorney malpractice actions. Because legal malpractice was a common-law claim, clients sued their attorneys for breach of professional obligations in the law courts. See R. Mallen & V. Levit, Legal Malpractice §§ 4 and 5, pp. 14–18 (2d ed. 1981). No one maintains that clients could obtain from these courts the injunctive relief offered in duty of fair representation actions. The evidence suggests that compensatory damages in malpractice cases resembled the monetary relief now awarded in duty of fair representation actions. See, *e. g.*, *Pitt* v. *Yalden*, *supra*, at 2062, 98 Eng. Rep., at 75–76 (opinion of Yates, J.) (discussing the measure of damages). Yet, as a historical matter, juries did have the authority to award exemplary damages in at least some tort actions. See *Browning-Ferris Industries* v. *Kelco Disposal, Inc.*, 492

U. S. 257, 274, and n. 20 (1989); *Curtis* v. *Loether*, 415 U. S., at 196. Although the parties have not cited any punitive damages award in an attorney malpractice action prior to 1791, courts have awarded such damages since the 19th century. See Mallen & Levit, *supra*, § 315, pp. 365–367; Wade, The Attorney's Liability for Negligence, 12 Vand. L. Rev. 755, 772 (1959).

For all these reasons, the suit here resembles a trust action, not a legal malpractice action. By this I do not imply that a union acts as a trustee in all instances or that trust law, as a general matter, should inform any particular aspects of federal labor law. Obvious differences between a union and a trustee will exist in other contexts. I would conclude only that, under the analysis directed by our precedents, the respondents may not insist on a jury trial. When all rights and remedies are considered, their action resembles a suit heard by the courts of equity more than a case heard by the courts of law. See *Tull*, 481 U. S., at 417. From this alone it follows that the respondents have no jury trial right on their duty of fair representation claims against the Union.

II

The Court relies on two lines of precedents to overcome the conclusion that the trust action should serve as the controlling model. The first consists of cases in which the Court has considered simplifications in litigation resulting from modern procedural reforms in the federal courts. JUSTICE MARSHALL asserts that these cases show that the Court must look at the character of individual issues rather than claims as a whole. See *ante*, at 569. The second line addresses the significance of the remedy in determining the equitable or legal nature of an action for the purpose of choosing the most appropriate analogy. Under these cases, the Court decides that the respondents have a right to a jury because they seek money damages. See *ante*, at 570–573. These authorities do not support the Court's holding.

A

In three cases we have found a right to trial by jury where there are legal claims that, for procedural reasons, a plaintiff could have or must have raised in the courts of equity before the systems merged. In *Beacon Theatres, Inc.* v. *Westover,* 359 U. S. 500 (1959), Fox, a potential defendant threatened with legal antitrust claims, brought an action for declaratory and injunctive relief against Beacon, the likely plaintiff. Because only the courts of equity had offered such relief prior to the merger of the two court systems, Fox had thought that it could deprive Beacon of a jury trial. Beacon, however, raised the antitrust issues as counterclaims and sought a jury. We ruled that, because Beacon would have had a right to a jury trial on its antitrust claims, Fox could not deprive it of a jury merely by taking advantage of modern declaratory procedures to sue first. The result was consistent with the spirit of the Federal Rules of Civil Procedure, which allow liberal joinder of legal and equitable actions, and the Declaratory Judgment Act, 28 U. S. C. §§2201, 2202 (1982 ed.), which preserves the right to jury trial to both parties. See 359 U. S., at 509–510.

In *Dairy Queen, Inc.* v. *Wood,* 369 U. S. 469 (1962), we held, in a similar manner, that a plaintiff, by asking in his complaint for an equitable accounting for trademark infringement, could not deprive the defendant of a jury trial on contract claims subsumed within the accounting. Although a court of equity would have heard the contract claims as part of the accounting suit, we found them severable under modern procedure. See *id.,* at 477–479.

In *Ross* v. *Bernhard,* 396 U. S. 531 (1970), a shareholder-plaintiff demanded a jury trial in a derivative action asserting a legal claim on behalf of his corporation. The defendant opposed a jury trial. In deciding the case, we recognized that only the courts of equity had procedural devices allowing shareholders to raise a corporation's claims. We nonetheless again ruled that modern procedure allowed trial of the legal claim to a jury. See *id.*, at 542.

These three cases responded to the difficulties created by a merged court system. See McCoid, Procedural Reform and the Right to Jury Trial: A Study of *Beacon Theatres, Inc.* v. *Westover*, 116 U. Pa. L. Rev. 1 (1967). They stand for the proposition that, because distinct courts of equity no longer exist, the possibility or necessity of using former equitable procedures to press a legal claim no longer will determine the right to a jury. JUSTICE MARSHALL reads these cases to require a jury trial whenever a cause of action contains legal issues and would require a jury trial in this case because the respondents must prove a breach of the collective-bargaining agreement as one element of their claim. See *ante*, at 569–570.

I disagree. The respondents, as shown above, are asserting an equitable claim. Having reached this conclusion, the *Beacon*, *Dairy Queen*, and *Ross* cases are inapplicable. Although we have divided self-standing legal claims from equitable declaratory, accounting, and derivative procedures, we have never parsed legal elements out of equitable claims absent specific procedural justifications. Actions which, beyond all question, are equitable in nature may involve some predicate inquiry that would be submitted to a jury in other contexts. For example, just as the plaintiff in a duty of fair representation action against his union must show breach of the collective-bargaining agreement as an initial matter, in an action against a trustee for failing to pursue a claim the beneficiary must show that the claim had some merit. See 3 A. Scott, Law of Trusts § 192, pp. 1589–1590, and n. 6 (3d ed. 1967). But the question of the claim's validity, even if the claim raises contract issues, would not bring the jury right into play in a suit against a trustee.

Our own writing confirms the consistency of this view with respect to the action before us. We have not deemed the elements of a duty of fair representation action to be independent of each other. Proving breach of the collective-bargaining agreement is but a preliminary and indispensable step to obtaining relief in a duty of fair representation action. We have characterized the breach-of-contract and duty issues as "inextricably interdependent" and have said that "[t]o prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." *DelCostello* v. *Teamsters*, 462 U. S. 151, 164–165 (1983) (internal quotation marks omitted). The absence of distinct equitable courts provides no procedural reason for wresting one of these elements from the other.

B

The Court also rules that, despite the appropriateness of the trust analogy as a whole, the respondents have a right to a jury trial because they seek money damages. See *ante*, at 570–573. The nature of the remedy remains a factor of considerable importance in determining whether a statutory action had a legal or equitable analog in 1791, but we have not adopted a rule that a statutory action permitting damages is by definition more analogous to a legal action than to any equitable suit. In each case, we look to the remedy to determine whether, taken with other factors, it places an action within the definition of "Suits at common law."

In *Curtis*, 415 U. S., at 195–196, for example, we ruled that the availability of actual and punitive damages made a statutory antidiscrimination action resemble a legal tort action more than any equitable action. We made explicit that we did not "go so far as to say that any award of monetary relief must necessarily be 'legal' relief." *Id.*, at 196. Although monetary damages might cause some statutory actions to resemble tort suits, the presence of monetary damages in this duty of fair representation action does not make it more analogous to a legal action than to an equitable action. Indeed, as shown above, the injunctive and monetary remedies available make the duty of fair representation suit less analogous to a malpractice action than to a suit against a trustee.

In *Tull*, 481 U. S., at 422, the availability of damages again played a critical role in determining the right to a jury trial. In an environmental suit by the Government for injunctive relief and a civil penalty, both an equitable public nuisance action and a legal action in debt seemed appropriate historical models. We decided between them by noting that only the courts of law could award civil penalties. See *id.*, at 422–425. In the present case, however, one cannot characterize both the trust analogy and the legal malpractice comparisons as appropriate; the considerations discussed above, including the remedy available, all make the trust model superior. As we stated in *Tull*, "[o]ur search is for a single historical analog, taking into consideration the nature of the cause of action and the remedy as two important factors." *Id.*, at 422, n. 6. The trust action alone satisfies this standard.

In *Granfinanciera, S. A.* v. *Nordberg*, 492 U. S. 33 (1989), we again found the presence of monetary relief critical in determining the nature of a statutory action as a whole. We held that, despite some evidence that both the courts of law and equity had jurisdiction over fraudulent conveyances, only a court of law could entertain an action to recover an alleged fraudulent transfer of a determinate sum of money. See *id.*, at 43–47. As in *Curtis* and *Tull*, however, the particular importance of monetary damages in *Granfinanciera* does not carry forward into this case. The courts of equity could and did award the kind of damages sought by the respondents here. The respondents' mere request for backpay in no way entitles them to a jury under the Seventh Amendment.

III

The Court must adhere to the historical test in determining the right to a jury because the language of the Constitution requires it. The Seventh Amendment "preserves" the right to jury trial in civil cases. We cannot preserve a right existing in 1791 unless we look to history to identify it. Our precedents are in full agreement with this reasoning and insist on adherence to the historical test. No alternatives short of rewriting the Constitution exist. See F. James, Civil Procedure § 8.5, p. 352 (1965) ("For good or evil, both the constitutio[n] and the charters of the merged procedure embody the policy judgment, quite deliberately made, to leave the extent of jury trial about where history had come to place it"); Shapiro & Coquillette, The Fetish of Jury Trial in Civil Cases: A Comment on *Rachal* v. *Hill*, 85 Harv. L. Rev. 442, 449 (1971) ("Even the most ardent critic of any historical test would concede that matters that would have fallen entirely within the jurisdiction of a court of equity or admiralty in 1791 do not come within the definition of a suit at 'common law' under the seventh amendment"). If we abandon the plain language of the Constitution to expand the jury right, we may expect Courts with opposing views to curtail it in the future.

It is true that a historical inquiry into the distinction between law and equity may require us to enter into a domain becoming less familiar with time. Two centuries have passed since the Seventh Amendment's ratification, and the incompleteness of our historical records makes it difficult to know the nature of certain actions in 1791. The historical test, nonetheless, has received more criticism than it deserves. Although our application of the analysis in some cases may seem biased in favor of jury trials, the test has not become a nullity. We do not require juries in all statutory actions. See, *e. g.*, *Lehman* v. *Nakshian*, 453 U. S. 156, 162, n. 9 (1981) (no jury trial right in suits against the United States); *Katchen* v. *Landy*, 382 U. S. 323, 337–340 (1966) (no jury trial right on certain bankruptcy claims); *Luria* v. *United States*, 231 U. S. 9, 27–28 (1913) (no jury trial right in action to cancel naturalization). The historical test, in fact, resolves most cases without difficulty. See C. Wright, Law of Federal Courts § 92, p. 609 (4th ed. 1983) ("[T]he vast and controversial literature that has developed as to the scope of the jury right is, fortunately, not in proportion to the practical importance of the problem in the actual working of the courts").

I would hesitate to abandon or curtail the historical test out of concern for the competence of the Court to understand legal history. We do look to history for the answers to constitutional questions. See, *e. g., Fay* v. *Noia,* 372 U. S. 391, 399–415 (1963) (opinion of BRENNAN, J.); *Atascadero State Hospital* v. *Scanlon,* 473 U. S. 234, 260–302 (1985) (BRENNAN, J., dissenting). Although opinions will differ on what this history shows, the approach has no less validity in the Seventh Amendment context than elsewhere.

If Congress has not provided for a jury trial, we are confined to the Seventh Amendment to determine whether one is required. Our own views respecting the wisdom of using a jury should be put aside. Like JUSTICE BRENNAN, I admire the jury process. Other judges have taken the opposite view. See, *e. g.,* J. Frank, Law and the Modern Mind 170–185 (1931). But the judgment of our own times is not always preferable to the lessons of history. Our whole constitutional experience teaches that history must inform the judicial inquiry. Our obligation to the Constitution and its Bill of Rights, no less than the compact we have with the generation that wrote them for us, do not permit us to disregard provisions that some may think to be mere matters of historical form.

IV

Because of the employer's bankruptcy, the respondents are proceeding only against the Union in the suit before us. In a typical duty of fair representation action, however, union members may sue both their union and their employer. See *Vaca* v. *Sipes,* 386 U. S., at 186. The Union argues that a duty of fair representation action against an employer also would have an equitable character because it resembles another trust action entertained in the courts of equity. It contends that, if a trustee fails to pursue a claim according to his duty, the beneficiary may join the trustee and the third party in one action and assert in his own name both the claim of breach of fiduciary duty and the claim against the third party. See Restatement § 282(1), p. 44 (1957); 4 A. Scott, Law of Trusts § 282.1, pp. 2338–2340 (3d ed. 1967); *Bowen* v. *United States Postal Service*, 459 U. S. 212, 243 (1983) (WHITE, J., concurring in judgment in part and dissenting in part). In this case, we do not have to determine the correctness of this analogy, nor must we decide whether *Beacon*, *Dairy Queen*, or *Ross* would require a jury trial in a suit against an employer. I would deny a jury trial to the respondents here, but would leave these other questions for a later time. Because the Court has reached a different result, I dissent.

UNITED STATES *v.* DALM

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88–1951. Argued January 10, 1990—Decided March 20, 1990

In 1975, respondent Dalm was appointed administratrix of her deceased former employer's estate. In 1976 and 1977, she received payments from the decedent's brother, who wanted her to share in the estate because of her years of service to the decedent. In December 1976, a federal gift tax return was filed, and the gift tax was paid, for that year's payment to Dalm. The Internal Revenue Service (IRS) then assessed penalties and interest with respect to the 1976 transfer, which were paid in March 1977. No gift tax return was filed for the 1977 payment. After auditing Dalm's 1976 and 1977 income tax returns, the IRS asserted deficiencies upon determining that she should have reported the payments from the brother as income to her as administratrix. Arguing that the payments were gifts, she petitioned the Tax Court for a redetermination of the deficiencies but made no claim for a credit or recoupment of the gift tax paid. The parties settled the case, agreeing to a stipulated decision that Dalm owed lesser income tax deficiencies than those asserted for both tax years. In November 1984, she filed an administrative claim for refund of the gift tax, interest, and penalties paid with respect to the 1976 transfer, even though 26 U. S. C. § 6511(a) required that any refund claim be filed within three years of when the return was filed. When the IRS failed to act on the claim, she filed a District Court action for a refund of "overpaid gift tax," alleging that the court had jurisdiction under 28 U. S. C. § 1346(a)(1). The court dismissed the suit for lack of jurisdiction in light of § 6511(a), rejecting her contention that the suit was timely under the doctrine of equitable recoupment set forth in *Bull* v. *United States*, 295 U. S. 247. The Court of Appeals reversed, finding that her claim satisfied all of the doctrine's requirements.

Held: The District Court lacked jurisdiction over Dalm's refund suit. Pp. 601–611.

(a) Title 28 U. S. C. § 1346(a)(1)'s provision of broad district court jurisdiction over civil tax refund suits must be read in conformity with other statutory provisions conditioning the right to bring such a suit, including 26 U. S. C. § 7422(a), which requires the prior filing of an administrative refund claim, and § 6511(a), which provides the applicable statute of limitations for filing such a claim. Since Dalm failed to file her claim within the specified time limits, the District Court was barred from entertaining her suit. Pp. 601–602.

(b) The statute of limitations long since having run, the doctrine of equitable recoupment does not support Dalm's suit. *Bull* must be distinguished on the ground that, there, equitable recoupment of estate tax was sought in an action for refund of income tax, over which the court had undisputed jurisdiction, and the only issue was whether the court, in the interests of equity, could adjust the income tax owed to take account of an estate tax paid in error but which the petitioner could not recover in a separate, time-barred refund action. Here, Dalm does not seek to invoke equitable recoupment in determining her income tax liability; she has already litigated that liability in the Tax Court without raising an equitable recoupment claim, and is foreclosed from litigating it now. She seeks to invoke equitable recoupment only in a separate action for refund of gift tax, an action for which there is no statutory authorization by reason of the statute of limitations bar. *Bull* and *Stone* v. *White*, 301 U. S. 532, stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction. They do not allow equitable recoupment to be the sole basis for jurisdiction. Pp. 602–608.

(c) Since Dalm failed to comply with the applicable statute of limitations, the Government is immune from suit under settled principles of sovereign immunity. See, *e. g., United States* v. *Mottaz*, 476 U. S. 834, 841. Because Dalm's action does not come within any of the statutory exceptions to the limitations period prescribed by §§ 7422 and 6511(a), allowing her to maintain this suit would effectively override Congress' judgment as to when equity requires an exception. Both the IRS and a court which has jurisdiction over a timely suit for refund may still consider an equitable recoupment claim for an earlier tax paid under an inconsistent theory on the same transaction. Pp. 608–610.

(d) The Court of Appeals' reasoning that recoupment should be permitted in this case because it effected, with respect to a single transaction, the recovery of a tax based upon a theory inconsistent with the theory upon which a later tax was paid mistakes the threshold requirement for such a suit. Although this Court's precedents allowing recoupment pertain to cases where a single transaction is subject to inconsistent taxation, the reason the statute of limitations is not a bar in those cases is that, unlike here, the court has uncontested jurisdiction to adjudicate one of the taxes in question and, therefore, the equitable power to examine and consider the entire transaction. See *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296, 299. Pp. 610–611.

867 F. 2d 305, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and SCALIA, JJ., joined. STEVENS, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 612.

Christine Desan-Husson argued the cause *pro hac vice* for the United States. On the briefs were *Solicitor General Starr, Assistant Attorney General Peterson, Deputy Solicitor General Wallace, Alan I. Horowitz, Gilbert S. Rothenberg,* and *Charles Bricken.*

Robert B. Pierce argued the cause for respondent. With him on the brief was *Paul T. Mengel.*

JUSTICE KENNEDY delivered the opinion of the Court.

Single transactions, it is well known, may be susceptible to different, and inconsistent, theories of taxation. In the case before us, the taxpayer treated moneys derived from her deceased employer's estate as a gift and paid gift tax on the transfer. Some years later, the Government contended that the money the taxpayer had received from the transaction was income. The taxpayer disagreed, and the Government's assertion of an income tax deficiency was the subject of proceedings in the United States Tax Court. The question presented is whether, the statute of limitations long since having run, the doctrine of equitable recoupment supports a separate suit for refund of the earlier paid gift tax after the taxpayer settled the Tax Court deficiency proceeding and agreed to pay income tax on the transaction. We hold that it does not.

I

The taxpayer, Frances Dalm, is the respondent here. Dalm was appointed administratrix of the estate of Harold Schrier in May 1975, at the request of Schrier's surviving brother, Clarence. It appears Dalm had been the decedent's loyal secretary for many years and that Clarence wanted her to take charge of the affairs of the estate and receive some of the moneys that otherwise would belong to him.

Dalm received fees from the estate, approved by the probate court, of $30,000 in 1976 and $7,000 in 1977. She also received from Clarence two payments, $180,000 in 1976 and $133,813 in 1977. Clarence and his wife filed a gift tax return in December 1976 reporting the $180,000 payment as a gift to Dalm, and in that same month Dalm paid the gift tax of $18,675. The Internal Revenue Service (IRS) later assessed an additional $1,587 in penalties and interest with respect to the transfer. The Schriers paid the penalties and interest in 1977, and were reimbursed by Dalm. But no gift tax return was filed with respect to the 1977 payment of $133,813.

After auditing Dalm's 1976 and 1977 income tax returns, the IRS determined that the payments from Clarence represented additional fees for Dalm's services as administratix of the estate and should have been reported as income. The IRS asserted deficiencies in her income tax of $91,471 in 1976, and $70,639 in 1977, along with additions to the taxes under § 6653(a) of the Internal Revenue Code of 1954 (IRC), 26 U. S. C. § 6653(a) (1982 ed.).[1]

Dalm petitioned the Tax Court for a redetermination of the asserted deficiencies, as was her right under § 6213(a). In her petition, she argued that the 1976 and 1977 payments from Clarence were gifts to carry out the wish of the decedent that she share in the estate. After two days of trial, Dalm and the IRS settled the case, with the parties agreeing to a stipulated decision that respondent owed income tax deficiencies of $10,416 for 1976 and $70,639 for 1977. No claim for a credit or recoupment of the gift tax paid by Dalm was raised in the Tax Court proceedings, although there is some dispute whether the gift tax was one of the factors considered in arriving at the terms of the settlement. See n. 2, *infra.*

Immediately after agreeing to the settlement, Dalm filed an administrative claim for refund of the $20,262 in gift tax, interest, and penalties paid with respect to the $180,000 transfer in 1976. The claim was filed in November 1984, even though the IRC required Dalm to file any claim for a refund of the gift tax by December 1979. See § 6511(a). When the IRS failed to act upon her claim within six months, Dalm filed suit in the United States District Court for the Western District of Michigan, seeking what in her complaint she denominated a refund of "overpaid gift tax." Her complaint alleged that the District Court had jurisdiction under 28 U. S. C. § 1346(a)(1) (1982 ed.).

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U. S. C.), as amended.

The Government moved to dismiss the suit for lack of jurisdiction and for summary judgment, arguing that the suit was untimely under the applicable statute of limitations. The District Court granted the Government's motions, rejecting Dalm's contention that her suit was timely under the doctrine of equitable recoupment as set forth in our opinion in *Bull* v. *United States*, 295 U. S. 247 (1935), a case we shall discuss. The court held that equitable recoupment did not authorize it to exercise jurisdiction over "an independent lawsuit, such as this suit, . . . maintained for a refund for a year in which the statute of limitations has expired." App. to Pet. for Cert. 19a.

On appeal, the Court of Appeals for the Sixth Circuit reversed. 867 F. 2d 305 (1989). The court found Dalm's claim satisfied all of the requirements for equitable recoupment expressed in our cases. It rejected the District Court's characterization of Dalm's action as an independent lawsuit barred by the statute of limitations, reasoning that she could maintain an otherwise barred action for refund of gift tax because the Government had made a timely claim of a deficiency in her income tax based upon an inconsistent legal theory. *Id.*, at 311–312 (citing *Kolom* v. *United States*, 791 F. 2d 762 (CA9 1986)).[2]

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[2] In its opinion granting summary judgment to the Government, the District Court had suggested that an alternative ground for decision was that the only plausible explanation for the allocation of the agreed income tax liability between 1976 and 1977 in the Tax Court settlement was

Because the approach taken by the Sixth and Ninth Circuits is in conflict with that adopted by Seventh Circuit, see *O'Brien* v. *United States*, 766 F. 2d 1038 (1985), we granted certiorari, 493 U. S. 807 (1989), and now reverse.

II

The ultimate question in the case is whether the District Court had jurisdiction over Dalm's suit seeking a refund of the gift tax, interest, and penalties paid on the 1976 transfer. We hold that it did not.

A

In her complaint, Dalm invoked 28 U. S. C. § 1346(a)(1) (1982 ed.), under which a district court has jurisdiction over a "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws." Despite its spacious terms, § 1346(a)(1) must be read in conformity with other statutory provisions which qualify a taxpayer's right to bring a refund suit upon compliance with certain conditions. The first is § 7422(a), which, tracking the language of § 1346(a)(1), limits a taxpayer's right to bring a refund suit by providing that

> "[n]o suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary,

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that the allocation reflected the previously paid gift tax on the 1976 transfer. The Sixth Circuit held that the District Court had erred in granting summary judgment on this issue, giving the taxpayer an opportunity to show the parties' intent in effecting the settlement. Accordingly, it remanded the case for further proceedings on this issue. 867 F. 2d, at 312.

> according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof."

Second, § 6511(a) provides that if a taxpayer is required to file a return with respect to a tax, such as the gift tax, the taxpayer must file any claim for refund within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires later. Read together, the import of these sections is clear: unless a claim for refund of a tax has been filed within the time limits imposed by § 6511(a), a suit for refund, regardless of whether the tax is alleged to have been "erroneously," "illegally," or "wrongfully collected," §§ 1346(a)(1), 7422(a), may not be maintained in any court. See *United States* v. *Kales*, 314 U. S. 186, 193 (1941).

There is no doubt that Dalm failed to comply with these statutory requirements. The Schriers filed their gift tax return and Dalm paid the gift tax on the 1976 transfer in December 1976. She paid the penalties and interest on that tax in March 1977. Dalm did not file her claim for refund of the gift tax until November 1984, long after the limitations period expired. Under the plain language of §§ 6511(a) and 7422(a), the District Court was barred from entertaining her suit for a refund of the tax.

B

The Court of Appeals did not contest this analysis; indeed, it recognized that "[t]here is no statutory basis for permitting the recovery of a tax overpayment after the statute of limitations has expired." 867 F. 2d, at 308. Despite the lack of a statutory basis for recovery, the court concluded that the doctrine of equitable recoupment permits Dalm to maintain an action to recover the overpaid gift tax. We disagree.

The doctrine of equitable recoupment was first addressed by us in our opinion in *Bull* v. *United States*, *supra*. There, the dispute centered on whether partnership distributions received by a decedent's estate after his death were subject to estate tax or income tax. After an audit, the executor of the estate included the sums in the estate tax return and paid the estate tax in 1920 and 1921. In 1925, the Commissioner of Internal Revenue notified the estate of a deficiency in the estate's income tax for the 1920 tax year, contending that the same distributions upon which estate tax had been paid should have been treated as income. The Commissioner, however, did not give credit for the estate tax earlier paid on the value of the distributions.

That same year, the estate petitioned to the Board of Tax Appeals for a redetermination of the deficiency.[3] After the Board sustained the Commissioner's deficiency determination, the estate paid the additional income tax and filed a claim for refund of the income tax paid. The Commissioner rejected the claim, and, in September 1930, the executor sued in the Court of Claims for a refund of the income tax.[4]

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[3] The Board of Tax Appeals, the forerunner to the United States Tax Court, was established by the Revenue Act of 1924 as "an independent agency in the executive branch of the Government." Revenue Act of 1924, Pub. L. 176, § 900(k), 43 Stat. 338. Under the Act, a taxpayer was permitted to challenge an income tax deficiency asserted by the Commissioner, prior to paying the deficiency, by way of a petition to the Board. See *id.*, §§ 274, 900; *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716, 721 (1929).

[4] Before the enactment of the Revenue Act of 1926, there was no direct review of Board of Tax Appeals decisions. As a result, a taxpayer who lost in proceedings before the Board was permitted to sue in district court or the Court of Claims for a refund after payment of the deficiency. In effect, the refund suit, although nominally a separate proceeding, was a mechanism by which taxpayers could obtain review of Board decisions. See *Old Colony Trust Co.*, *supra*, at 721–722; Ferguson, Jurisdictional Problems in Federal Tax Controversies, 48 Iowa L. Rev. 312, 350–351 (1963). The Revenue Act of 1926 put an end to this circuitous process. First, it provided for direct judicial review of Board decisions in the courts of appeals. Revenue Act of 1926, ch. 27, § 1001(a), 44 Stat. 109. Second, the Act provided that, once a taxpayer had filed a timely petition with the Board, the taxpayer generally could not institute a new suit in another court for refund of the same tax. *Id.*, § 284(d), 44 Stat. 67. Under our

In his petition to the Court of Claims, the executor argued (1) that the amount taxed was not income, so that the estate was entitled to a refund of the entire amount of income tax paid; and (2) alternatively, if the amount taxed was income, the Government should credit against the income tax due the overpayment of estate tax, plus interest, attributable to the inclusion of the amount in the taxable estate. The Court of Claims rejected both arguments.

We reversed, holding that the executor was entitled to a credit against the income tax deficiency in the amount of the overpayment of estate tax, with interest. 295 U. S., at 263. We began by acknowledging that the executor had not filed a claim for refund of the estate tax within the limitations period, and that any action for refund of the tax was now barred. *Id.*, at 259, 260–261. "If nothing further had occurred Congressional action would have been the sole avenue of redress." *Id.*, at 261.

What did occur, however, was that after the limitations period on the estate tax had run, the Government assessed a deficiency in the estate's income tax based upon the same taxable event, and the deficiency became the subject of litigation between the estate and the Government. We reasoned that a tax assessment is in essence an assertion by the sovereign that the taxpayer owes a debt to it; but that, because "taxes are the life-blood of government," it was necessary for the tax assessed to be collected prior to adjudication of whether the assessment was erroneous or unlawful. As a result,

> "the usual procedure for the recovery of debts is reversed in the field of taxation. Payment precedes defense, and the burden of proof, normally on the claimant,

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decision in *Old Colony Trust Co.*, *supra*, at 725–728, the Act did not apply to cases where, as in *Bull*, the taxpayer filed his or her petition with the Board and the Board had not issued a decision prior to the enactment of the Act in 1926. See generally Andrews, Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limitation in Federal Tax Controversies, 28 Ariz. L. Rev. 595, 599, n. 20 (1986).

> is shifted to the taxpayer. . . . But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign." *Id.*, at 260.

Under our reasoning, the proceeding between the executor and the Government was in substance an attempt by the Government to recover a debt from the estate. The debt was the income tax that was owed, even though in fact it already had been paid. Had the Government followed the "usual procedure" of recovering debts by instituting an action at law for the income tax owed, the executor would have been able to defend against the suit by "demanding recoupment of the amount mistakenly collected as estate tax and wrongfully retained." *Id.*, at 261 (citing *United States* v. *State Bank*, 96 U. S. 30 (1878)).

> "If the claim for income tax deficiency had been the subject of a suit, any counter demand for recoupment of the overpayment of estate tax could have been asserted by way of defense and credit obtained notwithstanding the statute of limitations had barred an independent suit against the Government therefor. This is because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded. Such a defense is never barred by the statute of limitations so long as the main action itself is timely." 295 U. S., at 262.

We found it immaterial that, rather than the Government having to sue to collect the income tax, the executor was required first to pay it and then seek a refund. "This procedural requirement does not obliterate his substantial right to rely on his cross-demand for credit of the amount which if the United States had sued him for income tax he could have recouped against his liability on that score." *Id.*, at 263.[5]

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[5] Since *Bull*, we have emphasized that a claim of equitable recoupment will lie only where the Government has taxed a single transaction, item, or taxable event under two inconsistent theories. See *Rothensies* v. *Electric*

Dalm contends that the only distinction between her case and *Bull* is the "meaningless procedural distinction" that her claim of equitable recoupment is raised in a separate suit for refund of gift tax, after she had litigated the income tax deficiency, while in *Bull* the claim of equitable recoupment of the estate tax was litigated as part of a suit for refund of that tax alleged to be inconsistent with the estate tax. A distinction that has jurisdiction as its central concept is not meaningless. In *Bull*, the executor sought equitable recoupment of the estate tax in an action for refund of income tax, over which it was undisputed that the Court of Claims had jurisdiction. See n. 4, *supra*. All that was at issue was whether the Court of Claims, in the interests of equity, could adjust the income tax owed to the Government to take account of an estate tax paid in error but which the executor could not recover in a separate refund action. Here, Dalm does not seek to invoke equitable recoupment in determining her income tax liability; she has already litigated that liability without raising a claim of equitable recoupment and is foreclosed from relitigating it now. See § 6512(a). She seeks to invoke equitable recoupment only in a separate action for refund of gift tax, an action for which there is no statutory authorization by reason of the bar of the limitations statute.

It is instructive to consider what the facts in *Bull* would have to be if Dalm's contention is correct that her case is identical to *Bull* in all material respects. The executor in *Bull* would have litigated the income tax liability, without raising a claim of equitable recoupment, in the Board of Tax Appeals and/or in the Court of Claims, with the Government winning in each forum. Then, having exhausted his avenues

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Storage Battery Co., 329 U. S. 296, 299–300 (1946); cf. *Stone* v. *White*, 301 U. S. 532 (1937) (permitting the Government to invoke equitable recoupment as a defense against a claim for refund of income tax paid by a trust where there was a complete identity of interest between the trust and the beneficiary who had received the income, and a claim against the beneficiary for the income tax was then barred).

of litigating the income tax liability and paid the tax, the executor would have filed a claim for refund of the estate tax with the Commissioner, asserting equitable recoupment as the basis for the refund, with the Commissioner rejecting it as untimely. At that point, the executor would have brought suit for refund of the estate tax in the Court of Claims after the statute of limitations had run. Had the case come to us with those facts, we would have faced the issue presented here: whether the court in which the taxpayer was seeking a refund was barred from entertaining the suit. We can say with assurance that we were not presented with this issue in *Bull* and did not consider it. Even had the issue been raised, *Bull* itself suggests that we would have rejected Dalm's argument out of hand. See *Bull*, 295 U. S., at 259 ("The fact that the petitioner relied on the Commissioner's assessment for estate tax, and believed the inconsistent claim of deficiency of income tax was of no force, cannot avail to toll the statute of limitations, which forbade the bringing of any action in 1930 for refund of estate tax payments made in 1921").

The only other decision in which we have upheld a claim or defense premised upon the doctrine of equitable recoupment is consistent with our analysis today. In *Stone* v. *White*, 301 U. S. 532 (1937), a trust had paid the income it received from the corpus to its sole beneficiary and also paid the tax due on the income. After the statute of limitations governing the Government's right to collect the income tax from the beneficiary had run, the trust filed a timely suit seeking a refund of the income tax paid on the theory that the beneficiary, not the trust, was liable for the tax. We held that, given the identity of interest between the beneficiary and the trust, the Government could invoke equitable recoupment to assert its now-barred claim against the beneficiary as a defense to the trust's timely claim for a refund. *Id.*, at 537–539. As in *Bull*, there was no dispute that the court in which we allowed the doctrine of equitable recoupment to be raised had jurisdiction over the underlying action: the trust's timely action for a refund of income tax.

In sum, our decisions in *Bull* and *Stone* stand only for the proposition that a party litigating a tax claim in a timely proceeding may, in that proceeding, seek recoupment of a related, and inconsistent, but now time-barred tax claim relating to the same transaction. In both cases, there was no question but that the courts in which the refund actions were brought had jurisdiction. To date, we have not allowed equitable recoupment to be the sole basis for jurisdiction.

C

Under settled principles of sovereign immunity, "the United States, as sovereign, 'is immune from suit, save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *United States* v. *Testan*, 424 U. S. 392, 399 (1976) (quoting *United States* v. *Sherwood*, 312 U. S. 584, 586 (1941)). A statute of limitations requiring that a suit against the Government be brought within a certain time period is one of those terms. See *United States* v. *Mottaz*, 476 U. S. 834, 841 (1986); *Block* v. *North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U. S. 273, 287 (1983). "[A]lthough we should not construe such a time-bar provision unduly restrictively, we must be careful not to interpret it in a manner that would 'extend the waiver beyond that which Congress intended.'" *Ibid.* (quoting *United States* v. *Kubrick*, 444 U. S. 111, 117–118 (1979)); *Library of Congress* v. *Shaw*, 478 U. S. 310, 318 (1986); *United States* v. *King*, 395 U. S. 1, 4 (1969) (waivers of sovereign immunity by Congress "cannot be implied but must be unequivocally expressed").

As we have determined, our previous equitable recoupment cases have not suspended rules of jurisdiction and so have not deviated from these principles. We likewise refuse Dalm's invitation to do so here. She seeks a refund not of income tax but of gift tax on which the return was filed and the tax paid in December 1976. For the District Court to have jurisdiction over her suit for refund, Dalm was required to file a claim for refund of the tax within three years of the time the gift tax return was filed or two years of the time the tax was paid, whichever period expires later. See §§ 6511(a), 7422(a).[6] There is no question but that she failed to do so.[7] Having failed to comply with the statutory requirements for seeking a refund, she asks us to go beyond the authority Congress has given us in permitting suits against the Government. If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress.

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[6] JUSTICE STEVENS calls it a fiction to cast Dalm's action as a suit for refund. He creates instead a distinction between refund actions and suits for funds wrongfully retained. See *post*, at 620–622. Neither the IRC nor our authorities support the distinction. Section 6511(a) applies to claims for refund of a tax "overpayment." The commonsense interpretation is that a tax is overpaid when a taxpayer pays more than is owed, for whatever reason or no reason at all. Even in *Bull*, the case upon which the dissent relies to assert that retention of the gift tax is unjust or fraudulent, we described the inconsistent tax as being an "overpayment." See, *e. g.*, 295 U. S., at 258, 262, 263. The word encompasses "erroneously," "illegally," or "wrongfully" collected taxes, as those terms are used in 28 U. S. C. § 1346(a)(1) (1982 ed.) and § 7422(a).

There is a further statutory point. By its express language, § 7422(a) conditions a district court's authority to hear a refund suit, regardless of whether the tax is alleged to have been erroneously, illegally, or wrongfully collected, upon the filing of a claim for refund. If, as even JUSTICE STEVENS appears to concede, see *post*, at 620, the term "overpayment" as used in § 6511(a) encompasses erroneous or illegal collection, there is no reason to conclude that it does not also encompass wrongful collection.

As a final matter, we note that both Dalm and the Court of Appeals must have been misled by what JUSTICE STEVENS now thinks a fiction. Dalm's complaint sought a "refund" of "overpaid gift taxes"; and the Court of Appeals treated the claim as one for "recovery of a tax overpayment." See Complaint, 2–3; 867 F. 2d 305, 308 (CA6 1989). We have no doubt that these characterizations were correct.

[7] In a final attempt to bring her refund suit within the statute, Dalm contends that her suit was timely. She argues that the gift tax was not paid for the purposes of § 6511(a) until 1984, when it was determined that she owed income tax on the same transaction under an inconsistent theory. So, she asserts, her cause of action for refund of gift tax did not arise until that time. We disagree. The most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. The very purpose of statutes of limitations in the tax context is to bar the asser-

Our conclusion is reinforced by the fact that Congress has legislated a set of exceptions to the limitations period prescribed by §§ 7422 and 6511(a). In 1938, Congress adopted what are known as the mitigation provisions, now codified at §§ 1311–1314. These statutes, in specified circumstances, permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise barred by §§ 7422(a) and 6511(a). It is undisputed that Dalm's action does not come within these provisions; were we to allow her to maintain a suit for refund on the basis of equitable recoupment, we would be doing little more than overriding Congress' judgment as to when equity requires that there be an exception to the limitations bar.

Our holding today does not leave taxpayers in Dalm's position powerless to invoke the doctrine of equitable recoupment. Both the Secretary, at the administrative level, see Rev. Rul. 71–56, 1971–1 Cum. Bull. 404 (revoking Rev. Rul. 55–226, 1955–1 Cum. Bull. 469), and a court which has jurisdiction over a timely suit for refund may consider an equitable recoupment claim for an earlier tax paid under an inconsistent theory on the same transaction.

III

The Court of Appeals reasoned that recoupment should be permitted because it effected, with respect to a single transaction, the recovery of a tax based upon a theory inconsistent

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tion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.

with the theory upon which a later tax was paid. But to permit an independent action for recoupment because there is but one transaction is to mistake the threshold requirement for its rationale. It is true that our precedents allowing recoupment pertain to cases where a single transaction is subjected to inconsistent taxation, but the reason the statute of limitations is not a bar in those cases is that the court has uncontested jurisdiction to adjudicate one of the taxes in question. In such cases, a court has the equitable power to examine and consider the entire transaction:

> "The essence of the doctrine of recoupment is stated in the *Bull* case: 'recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded.' 295 U. S. 247, 262. It has never been thought to allow one transaction to be offset against another, but only to permit a transaction which is made the subject of suit by plaintiff to be examined in all its aspects, and judgment to be rendered that does justice in view of the one transaction as a whole." *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296, 299 (1946).

Here the Government asserted an income tax deficiency on a theory inconsistent with the theory upon which Dalm relied in paying gift tax. She chose to litigate the deficiency in the Tax Court, where she did not attempt to raise a recoupment claim.[8] She cannot choose this avenue to adjudicate the income tax consequences of the transaction, and then seek to reopen the matter and override the statute of limitations for the sole purpose of seeking recoupment. The controlling jurisdictional statutes do not permit her to do so.

The judgment of the Court of Appeals is therefore reversed.

It is so ordered.

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[8] We have no occasion to pass upon the question whether Dalm could have raised a recoupment claim in the Tax Court.

JUSTICE STEVENS, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This is not a decision that will be much celebrated or often cited. Few cases are affected, and not a single brief *amicus curiae* was filed. The Court reserves in a footnote an issue that would render obsolete its holding. The case casts a shadow on the Executive—and on this Court—but otherwise has no apparent importance.

Indeed, the Court's opinion is remarkable not at all for what it says but rather for what it leaves unsaid. The majority's parsing of sovereign immunity and jurisdiction masks what is the ultimate question before us: whether a statute of limitations otherwise barring a refund of federal income tax is tolled by Government conduct that this Court has censured as "immoral" and tantamount to "a fraud on the taxpayer's rights." See *Bull* v. *United States*, 295 U. S. 247, 261 (1935). The Court today offers a jurisdictional apology when it could—and should—follow the just rule of the *Bull* case.

I

This case is remarkably similar to its 55-year-old precursor. The *Bull* case involved an attempt by the Government to collect income tax on partnership distributions received by the estate of a deceased partner. The Commissioner of Internal Revenue had already collected an estate tax on the distributions on the assumption that they constituted part of the estate corpus. The Commissioner contended, first, that the same transactions could constitute both corpus and income and thus be subject to both an estate tax and an income tax, and, second, that, in any event, the statute of limitations barred a recovery of the estate tax. This Court rejected the Commissioner's first argument, and characterized as follows his claim that the Government could retain the estate tax while collecting a second tax on the same transaction pursuant to an inconsistent theory:

> "The United States, we have held, cannot, as against the claim of an innocent party, hold his money which has gone into its treasury by means of the fraud of its agent. *United States* v. *State Bank*, 96 U. S. 30. While here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights." 295 U. S., at 261.

This case involves an equally unjust retention of a previously paid tax. The Government has collected an income tax on a transfer of $180,000 to respondent while retaining the gift tax previously paid on the same transfer. The Court's decision assumes, as the summary judgment record requires, that when the Government compromised its claim for an income tax deficiency, it allowed respondent no credit for the gift tax that had previously been paid. Thus, the critical fact that made the Government's position in *Bull* immoral is present here: a single taxable event has been subjected to two taxes on mutually inconsistent theories.[1]

II

Even with the parallel between *Bull* and this case clearly in mind, most readers of the majority's opinion must wonder how this case ever came before our Court, and why the majority must recite so much law to decide it. According to the majority, respondent chose to litigate in the Tax Court the deficiency assessed against her, and, having made this choice, cannot "then seek to reopen the matter and override the statute of limitations for the sole purpose of seeking recoupment." *Ante*, at 611. This may seem fair enough, but also plain enough: A legal claim that might have been settled in an earlier proceeding is usually barred by rules of claim preclusion. If the claim is not barred by the settlement agreement in this case, then surely the Government can—without any help from this Court—avoid such problems in the future by drafting its settlement agreements more carefully. There is accordingly no justification for the Court's exercise of certiorari jurisdiction in this case, a discretionary act which has done nothing more useful than deprive the twice-taxed respondent *in this case* of a remedy for a wrong done by the Government.[2]

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[1] Arguably the Government's position in this case is even more outrageous than the position it took in *Bull* because its income tax assessment in that case was perfectly sound. In this case, however, its income tax claim was based on the remarkable theory that payments aggregating $313,813 constituted compensation for respondent's services as administratrix of her former employer's estate when the probate court had approved a total of $37,000 as compensation for those services. I do not, however, place any reliance on this aspect of the case, just as the Court correctly abstains from suggesting that the harshness of its holding is mitigated by the unresolved factual dispute about whether the Tax Court settlement took into account the prior gift tax payment. See *ante*, at 600–601, n. 2.

Two facts explain why the Government does not rely on principles of claim preclusion as a defense in this case. The first is this: It is undisputed by the parties to this case that the Tax Court lacked jurisdiction to consider recoupment of the gift tax payment against the income tax deficiency.[3] According to the Government, respondent cannot, and for that reason did not, raise her equitable recoupment claim in the Tax Court: "respondent's choice of the Tax Court forum precluded her from claiming equitable recoupment against the income tax deficiency." Reply Brief for United States 6. The Government acknowledges that respondent may have had a sound claim for recoupment, but insists that to pursue this claim she should have "paid the 1976 and 1977 income tax deficiencies and then brought a timely refund suit in district court or the Claims Court." *Id.*, at 3–4.

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[2] The majority states that certiorari was granted in this case to resolve a conflict among the Courts of Appeals. If there were such a conflict it would not be of sufficient importance to merit our attention, but in fact no relevant conflict exists. The majority correctly observes that the decision of the Court of Appeals for the Sixth Circuit in this case agrees with that of the Court of Appeals for the Ninth Circuit in *Kolom* v. *United States*, 791 F. 2d 762 (1986). The Court erroneously suggests that these decisions are contrary to *O'Brien* v. *United States*, 766 F. 2d 1038 (CA7 1985). *O'Brien* was not a case in which a taxpayer sought to litigate an equitable recoupment claim in District Court after litigating in the Tax Court the assessment that generated the recoupment claim. In *O'Brien*, the beneficiary of an estate sought to litigate a recoupment claim after a deficiency was assessed against, and litigated in the Tax Court by, the estate itself. The Court of Appeals for the Seventh Circuit held that only the estate, not the beneficiary, could assert any available recoupment claim. *Id.*, at 1050–1051. I do not believe the Court of Appeals for the Seventh Circuit spoke to the question at issue here, see *id.*, at 1050, n. 15, but to the extent it did so, its remarks were obviously dicta. The Court thus today endorses a rule that no Court of Appeals has ever adopted.

The second fact is this: an affluent taxpayer, but not a less fortunate one, can pay a deficiency assessment and file suit for a refund. It is undisputed that if respondent had the means to do so, she could have recovered the gift tax that had been paid in 1976 by a refund action filed after she received the notice of income tax deficiency in 1983, even though the statute of limitations had long since run. One might infer from the posture of this case—as respondent's counsel represented to the Court—that respondent's limited means foreclosed this avenue of relief for her. She therefore challenged the deficiency in the Tax Court.

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[3] See Rev. Rul. 71–56, 1971–1 Cum. Bull. 404, 405 ("[T]he Tax Court lacks jurisdiction to consider a plea of equitable recoupment"); see also *Estate of Schneider* v. *Commissioner*, 93 T. C. 568 (1989). In *Rothensies* v. *Electric Storage Battery Co.*, 329 U. S. 296, 303 (1946), we cited *Commissioner* v. *Gooch Milling & Elevator Co.*, 320 U. S. 418 (1943), for the proposition that the Tax Court has no jurisdiction to consider recoupment. A careful reading of the *Gooch Milling* opinion, and of the relevant statute, however, will show that it actually considered only the question of recoupment based on an overpayment in a year other than the year in dispute. I therefore commend the Court for its careful reservation of this issue, see *ante*, at 611, n. 8. It is nevertheless appropriate to assume for purposes of deciding the jurisdictional issue in this case that respondent's counsel correctly believed that no recoupment could be had in the Tax Court.

Of course, if this Court were eventually to decide the reserved issue by holding that the Tax Court has jurisdiction to hear an equitable recoupment claim, today's decision would become a complete dead letter. No taxpayer would have any reason to litigate the deficiency and the recoupment issues separately, and in any event a judgment upon the former would bar a subsequent suit upon the latter under the doctrine of res judicata.

These two facts explain what the majority does not: why we are not addressing a simple case of res judicata. It is clear that the basis for respondent's equitable recoupment claim did not exist until it was determined that the payment made in 1976 was taxable as income. Thus, respondent could apparently obtain a forum to hear her equitable recoupment claim only by seeking a refund of the previously paid gift tax—an action which all agree was barred by limitations when respondent received the notice of deficiency in 1983.

When that determination was made—that is to say, when the income tax case was settled—respondent promptly asserted her recoupment claim in the only forum available. Indeed, she filed her claim for a gift tax refund even *before* the settlement agreement was consummated. In view of the fact that the character of the 1976 transaction remained in dispute until the claim was filed, none of the policy reasons that normally support the application of a statute of limitations is implicated by this case.

III

The Court nevertheless denies respondent the relief devised by the *Bull* Court. Ignoring both the policies underlying the statute of limitations and the principles of just conduct underlying *Bull*, the Court confronts respondent with the majestic voices of "jurisdiction" and "sovereign immunity"—voices that seem to have a haunting charm for this Court's current majority.

The Court that decided the *Bull* case reasoned not in obeisance to these siren-like voices but rather under the reliable guidance of a bright star in our jurisprudence: the presumption that for every right there should be a remedy. See *Marbury* v. *Madison*, 1 Cranch 137, 162–163 (1803). Without any sacrifice of technical propriety, the *Bull* Court could have found that the lapse of time had divested the Court of Claims of jurisdiction to allow the taxpayer credit for the previously paid estate tax. It easily avoided that unjust result, however, by relying on the special features of the tax collection procedures that impose burdens on the taxpayer unlike those imposed on ordinary litigants. The net effect of its analysis was to hold that in a refund action based on the multiple and inconsistent taxation of a single transaction, the taxpayer is to be treated as though she were the defendant even though she is actually the plaintiff.[4]

I would adopt the same course in this case. By initiating a proceeding to recover income tax based on the 1976 payment, the Government waived the time bar that would otherwise have precluded a claim for refund of the gift tax. Had respondent paid the deficiency and asserted the claim for a gift tax refund as a second count in one action, even this Court would agree that the claim was timely. If we adopt the Court's reasoning in *Bull*, it is proper to treat the second count of the refund action as timely even when the income tax issues are litigated before the Tax Court, because the deficiency assessment was sufficient to put in issue the right to recoupment and to justify treating the taxpayer as a defendant, rather than a plaintiff. If it was not too late for the Government to litigate the tax consequences of the 1976 payment, it should not be too late for the taxpayer to do so. "A different result here [is] a reproach to our jurisprudence." *United States* v. *State Bank*, 96 U. S. 30, 36 (1878).

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[4] "The ordinary defendant stands in judgment only after a hearing. The taxpayer often is afforded his hearing after judgment and after payment, and his only redress for unjust administrative action is the right to claim restitution. But these reversals of the normal process of collecting a claim cannot obscure the fact that after all what is being accomplished is the recovery of a just debt owed the sovereign. If that which the sovereign retains was unjustly taken in violation of its own statute, the withholding is wrongful. Restitution is owed the taxpayer. Nevertheless he may be without a remedy. But we think this is not true here.

"In a proceeding for the collection of estate tax, the United States through a palpable mistake took more than it was entitled to. Retention of the money was against morality and conscience. But claim for refund or credit was not presented or action instituted for restitution within the period fixed by the statute of limitations. If nothing further had occurred Congressional action would have been the sole avenue of redress.

. . . . .

"To the objection that the sovereign is not liable to respond to the petitioner the answer is that it has given him a right of credit or refund, which though he could not assert it in an action brought by him in 1930, had accrued and was available to him since it was actionable and not barred in 1925 when the Government proceeded against him for the collection of income tax.

"The pleading was sufficient to put in issue the right to recoupment." *Bull* v. *United States*, 295 U. S. 247, 260–261, 263 (1935).

IV

It may reasonably be said that the disposition in *Bull* involved an unusually flexible treatment of legal categories. The rights of a plaintiff are construed by reference to the status of a defendant so as to permit, in effect, the equitable tolling of a limitations period. A doctrinal innovation that appears imaginative may, however, be nothing more than the necessary expression of an exception to a generally appropriate definition. This particular exception deserves the status of a legal rule by virtue of our decision in *Bull*. There is no reason to retreat from the direction of that precedent today.

There is, moreover, nothing especially sober or unflinching about the majority's disposition of this case. Quite the contrary is true. The majority's approach depends upon showing that this Court is constrained by tightly drawn jurisdictional boundaries, but, as the majority concedes, the relevant jurisdictional statute speaks in "spacious terms." *Ante*, at 601. Indeed, the statute confers jurisdiction not only over any "civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected," but also over any such action to recover "any sum alleged to have been excessive or in any manner wrongfully collected under the internal revenue laws." 28 U. S. C. § 1346(a)(1) (1982 ed.).[5]

The majority correctly recognizes that this blanket waiver of immunity can be converted into a jurisdictional straitjacket only by recourse to limitations spelled out elsewhere. The majority would find these limitations in § 7422 and § 6511(a) of the Internal Revenue Code. The first of these provisions stipulates that no tax refund suit "shall be maintained . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U. S. C. § 7422(a) (1982 ed.).[6] The second provision establishes a statute of limitations applicable to actions for refund of taxes paid by filing a return or by means of a stamp. 26 U. S. C. § 6511(a) (1982 ed.).[7] It is the latter of these two provisions which gives the majority the shackles it seeks: the statute of limitations in § 6511(a) is a provision of law that, under § 7422(a), restricts the capacity of taxpayers to maintain suits. Denominating respondent's suit an action for refund of overpaid gift tax, the majority declares there can be "no doubt" that the combined operation of § 7422(a) and § 6511(a) strips the federal courts of the jurisdiction otherwise accorded by 28 U. S. C. § 1346(a)(1) (1982 ed.) over the recoupment suit.

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[5] The provision reads:

"The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of: (1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws."

[6] The majority quotes this provision in its entirety. See *ante*, at 601–602.

[7] The provision reads:

"Claim for credit or refund of an overpayment of any tax imposed by this title in respect of which tax the taxpayer is required to file a return shall be filed by the taxpayer within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed by the taxpayer, within 2 years from the time the tax was paid. Claim for credit or refund of an overpayment of any tax imposed by this title which is required to be paid by means of a stamp shall be filed by the taxpayer within 3 years from the time the tax was paid."

I have no doubt that § 6511 prescribes the statute of limitations applicable to actions for the refund of overpaid gift tax, and that, if this were such an action, the section would at least support the majority's argument. This suit is not, however, technically a suit for the refund of overpaid gift tax within the meaning of § 6511(a). The gravamen of respondent's claim is not that the gift tax was overpaid, but that it was unjustly retained. According to the *Bull* Court, "[w]hile here the money was taken through mistake without any element of fraud, the unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights." 295 U. S., at 261. In my opinion, a sum fraudulently retained under the internal revenue laws is an amount included within § 1346(a)(1)'s provision for recovery of "any sum . . . in any manner wrongfully collected under the internal-revenue laws." The jurisdictional grant expressly distinguishes such wrongfully collected sums from those sums which are simply "excessive," and from taxes "erroneously or illegally assessed or collected." These latter phrases would appear to cover actions for refund of an overpaid gift tax, but the payment fraudulently retained in this case is better characterized as a "sum . . . wrongfully collected." Likewise, § 6511(a) by its express terms applies only to actions for refund of an "overpayment of any tax" paid by means of a return or a stamp. It is odd to speak of the overpayment of a fraud, and one is not ordinarily required to file a return in order to be defrauded—even when the sovereign is the malefactor. I conclude that, technically speaking, this action is one for the recoupment of tax wrongfully collected because fraudulently retained, and not for the refund of tax overpaid. The plain language of § 1346(a)(1) accords jurisdiction over respondent's suit, and the terms of § 6511(a) do not divest it.[8] The majority's affection for plain language seems to end where its devotion to sovereign immunity begins.[9]

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[8] The income tax deficiency was assessed against respondent in June 1983. In November 1984, respondent filed an administrative claim seeking relief from the inconsistent tax treatment of the transaction. This suit followed in September 1985. The suit would thus be timely even if the 2-year limitations period from § 6511(a) were borrowed and applied to claims arising out of a "wrongful collection" resulting from inconsistent taxation.

[9] Respondent's complaint identifies this action as one for "recovery of Internal Revenue taxes and interest erroneously collected from" respondent, and alleges that "overpaid gift taxes" are due and owing to respondent. Respondent filed with the Internal Revenue Service claims for refund of overpaid gift tax. I do not, however, understand the majority to rely upon these details of the pleadings. Nor could it reasonably do so. As the Government's handling of this case makes clear, it understood the basis for respondent's cause of action. That basis is, moreover, evident from the face of the complaint, which alleges that:

> "4. It is inequitable for Defendant to collect taxes on the same fund on the mutually exclusive theories of said amount of money being both income and a gift.
>
> "5. Accordingly, timely Claims for Refund was *[sic]* filed on November 1, 1984 . . . .
>
> * * * * *
>
> "7. The action of the Defendant, through its agents, in assessing and collecting the amounts referred to in Paragraph 2 [alleging the payment of gift taxes in 1976 and 1977] hereof was improper, illegal and erroneous."

Nowhere does the complaint allege that the gift tax was collected as the result of erroneous calculations, mistaken facts, or misinterpreted provisions of law. The sole reason given for recognizing the gift tax as an "overpayment" is that its retention would be "inequitable."

If indeed the premise for the majority's holding is an especially strict rule of pleading, then the majority's holding becomes not simply trivial but absurd. The pleading rule imposed certainly does not have "jurisdiction as its central concept," and thus would even by the majority's logic be a "'meaningless procedural distinction.'" See *ante,* at 606. Cf. *United States* v. *Kales,* 314 U. S. 186, 194 (1941) ("This Court . . . has often held that a notice fairly advising the Commissioner of the nature of the taxpayer's claim, which the Commissioner could reject because too general or because it does not comply with formal requirements of the statute and regu-

The majority is able to complete its argument only by inventing a small, but blatant, fiction: that respondent is bringing a suit for the refund of overpaid gift tax within the meaning of 26 U. S. C. § 6511(a) (1982 ed.). This minor fiction is then conscripted by the majority's strategy to serve the vainest of all legal fictions, the doctrine of sovereign immunity. The doctrine has its origin in the ancient myth that the "[K]ing can do no wrong." See 1 W. Blackstone, Commentaries *238. Whatever might be said in favor of this polite falsehood in English law, the doctrine is an anomalous import within our own. See *Nevada* v. *Hall*, 440 U. S. 410, 414–415 (1979); see also *Will* v. *Michigan Dept. of State Police*, 491 U. S. 58, 87 (1989) (STEVENS, J., dissenting). Its persistence cannot be denied but ought not to be celebrated. Nor should its fictive origin ever be forgotten. There is no cause to expand the doctrine, and we do better to interpret § 1346(a)(1) by the light of equity and with due regard for the practicalities of revenue collection discussed in *Bull*.

To be useful, legal concepts must accommodate most disputes without the dissonance accompanying blended categories, but must also permit such flexibility when judgment demands it. It is not surprising that our concepts should be stressed when the Government taxes a citizen twice upon inconsistent theories and then subjects the citizen to a choice among competing fora, each of which provides only half a remedy. It is equally unsurprising, and in fact encouraging, that such problems occur so rarely that Congress has not made any explicit provision for them.[10]

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lations, will nevertheless be treated as a claim, where formal defects and lack of specificity have been remedied by amendment filed after the lapse of the statutory period").

[10] The majority supposes that its "conclusion is reinforced by the fact that Congress has legislated a set of exceptions to the limitations period" which "permit a taxpayer who has been required to pay inconsistent taxes to seek a refund of a tax the recovery of which is otherwise barred." See *ante*, at 610. The exceptions were enacted two years after *Bull* was decided. It is undisputed that these exceptions do not apply in this case. Unlike the

What is surprising is that this Court believes the equitable decision of the Court of Appeals in need of correction. The Court today has taken discretionary jurisdiction over a case of no broad import, and has undone equity by rendering an opinion true to neither the spirit nor the letter of American law. The Court takes its stand upon the grave declaration that a "distinction that has jurisdiction as its central concept is not meaningless." *Ante*, at 606. I am not sure what this solemn truism means, but I do know that it does not decide this case.

Because I am unable to discover any just reason for distinguishing this case from *Bull*, I respectfully dissent.

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majority, I am not persuaded that because Congress took special steps to ensure that twice-taxed citizens were treated equitably under some circumstances, Congress must have intended to gut judicially created doctrines which ensured equitable treatment for twice-taxed citizens under other circumstances. The contrary inference seems more plausible. See Andrews, Modern-Day Equitable Recoupment and the "Two Tax Effect:" Avoidance of the Statutes of Limitation in Federal Tax Controversies, 28 Ariz. L. Rev. 595, 619–623 (1986).

BUTTERWORTH, ATTORNEY GENERAL OF FLORIDA, ET AL. *v.* SMITH

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 88-1993. Argued January 16, 1990—Decided March 21, 1990

When respondent Smith, a reporter, testified before a state grand jury about alleged improprieties committed by certain public officials, he was warned that if he revealed his testimony in any manner, he would be subject to criminal prosecution under Fla. Stat. § 905.27, which prohibits, *inter alios,* a witness from ever disclosing testimony given before a grand jury. After the grand jury terminated its investigation, Smith—who wanted to write about the investigation's subject matter, including, *inter alia,* his grand jury testimony—filed suit in Federal District Court, seeking a declaration that § 905.27 was an unconstitutional abridgment of speech, and an injunction preventing the State from prosecuting him. The court granted summary judgment to the State, but the Court of Appeals reversed. It held that § 905.27 is unconstitutional to the extent that it applies to witnesses who speak about their own testimony after the grand jury investigation is terminated.

Held: Section 905.27 violates the First Amendment insofar as it prohibits a grand jury witness from disclosing his own testimony after the grand jury's term has ended. Pp. 629–636.

(a) To determine the validity of Florida's ban, the State's interests in preserving the confidentiality of its grand jury proceedings must be balanced against Smith's asserted First Amendment rights. See *Landmark Communications Inc.* v. *Virginia,* 435 U. S. 829, 838. *Seattle Times Co.* v. *Rhinehart,* 467 U. S. 20—which held that a protective order prohibiting a newspaper from publishing information which it had obtained through discovery procedures did not offend the First Amendment—does not govern the validity of Florida's ban, since the instant case deals with divulging information that was in a witness' possession before he testified before the grand jury, not information he may have obtained from his participation in those proceedings. State officials may not constitutionally punish publication of lawfully obtained truthful information about a matter of public importance absent a need to further a state interest of the highest order. Pp. 629–632.

(b) Florida's interests in preserving grand jury secrecy either are not served by, or are insufficient to warrant, its ban. Once an investigation ends, there is no need to keep information from the targeted individual to prevent his escape, since he will have been either exonerated or charged. Nor is there a need to prevent the importuning of grand jurors whose deliberations will be over. Similarly, the concern that some witnesses will be deterred from presenting testimony due to fears about retribution is not advanced by the ban, since any witness is free not to divulge his own testimony, and since the part of § 905.27 that prohibits a witness from disclosing the testimony of another witness remains enforceable. While Florida's interest in preventing the subornation of grand jury witnesses who will later testify at trial is served by the ban to the extent that the accused will have an additional opportunity to learn of the witness' existence, its effect is marginal at best and insufficient to outweigh the First Amendment interest involved. With present-day criminal procedure generally requiring disclosure of witnesses by the State, the witness' name will be available to the accused before trial anyway. In addition, Florida has substantial criminal penalties for both perjury and witness tampering, and its courts have subpoena and contempt powers available to bring recalcitrant witnesses to the stand. Although Florida has a substantial interest in seeing that persons who are exonerated will not be held up to public ridicule, that interest alone cannot justify the proscription of truthful speech, absent exceptional circumstances. Pp. 632–634.

(c) The fact that neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the States, found it necessary to impose an obligation of secrecy on grand jury witnesses to protect any of the interests asserted by Florida is probative of the weight to be assigned those interests and the extent to which the ban in question is necessary to further them. Pp. 634–635.

(d) The ban's impact on Smith's ability to make a truthful public statement is dramatic. Here, Smith, who before testifying was free to speak about information he possessed on matters of admitted public concern, believes that he is no longer free to communicate this information. The potential for abuse of the ban, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent. Pp. 635–636.

866 F. 2d 1318, affirmed.

REHNQUIST, C. J., delivered the opinion for a unanimous Court. SCALIA, J., filed a concurring opinion, *post*, p. 636.

George L. Waas, Assistant Attorney General of Florida, argued the cause for petitioners. With him on the briefs were *Robert A. Butterworth*, Attorney General, *pro se*, and *Louis F. Hubener*, Assistant Attorney General.

Gregg D. Thomas argued the cause for respondent. With him on the brief were *Steven L. Brannock* and *Julian Clarkson.**

CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

A Florida statute, with certain limited exceptions, prohibits a grand jury witness from ever disclosing testimony which he gave before that body. We hold that insofar as the Florida law prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended, it violates the First Amendment to the United States Constitution.

Respondent was a reporter for the Charlotte Herald-News in Charlotte County, Florida. While writing a series of newspaper articles, he obtained information relevant to alleged improprieties committed by the Charlotte County State Attorney's Office and Sheriff's Department. A special prosecutor appointed to investigate the allegations called respondent to testify before a special grand jury which had been convened as part of the investigation. At the time he testified, respondent was warned by the special prosecutor's staff not to reveal his testimony in any manner, and that such revelation could result in a criminal prosecution for violating Fla. Stat. § 905.27. Section 905.27 provides in pertinent part:

**Arthur I. Jacobs* filed a brief for the Florida Prosecuting Attorneys Association as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *M. David Gelfand*, *Terry E. Allbritton*, *James K. Green*, and *Steven R. Shapiro;* and for the Florida Press Association et al. by *Richard J. Ovelmen*, *Gregg D. Thomas*, and *Gary B. Pruitt.*

Briefs of *amici curiae* were filed for the State of Arizona by *Robert K. Corbin*, Attorney General, *Jessica Gifford Funkhouser*, and *Georgia B. Ellexson;* and for the Reporters Committee for Freedom of the Press et al. by *Jane E. Kirtley*, *W. Terry Maguire*, *Richard M. Schmidt, Jr.*, *Robert J. Brinkmann*, *Robert Litt*, *James Grossberg*, *J. Laurent Scharff*, and *Bruce Sanford.*

"(1) A grand juror . . . or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury . . . except when required by a court to disclose the testimony for the purpose of:

"(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

"(b) Determining whether the witness is guilty of perjury; or

"(c) Furthering justice.

"(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding." Fla. Stat. § 905.27 (1989).[1]

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[1] The entire text of § 905.27 provides as follows:

"905.27. Testimony not to be disclosed; exceptions.

"(1) A grand juror, state attorney, assistant state attorney, reporter, stenographer, interpreter, or any other person appearing before the grand jury shall not disclose the testimony of a witness examined before the grand jury or other evidence received by it except when required by a court to disclose the testimony for the purpose of:

"(a) Ascertaining whether it is consistent with the testimony given by the witness before the court;

"(b) Determining whether the witness is guilty of perjury; or

"(c) Furthering justice.

"(2) It is unlawful for any person knowingly to publish, broadcast, disclose, divulge, or communicate to any other person, or knowingly to cause or permit to be published, broadcast, disclosed, divulged, or communicated to any other person, in any manner whatsoever, any testimony of a witness examined before the grand jury, or the content, gist, or import thereof, except when such testimony is or has been disclosed in a court proceeding. When a court orders the disclosure of such testimony pursuant to subsection (1) for use in a criminal case, it may be disclosed to the prosecuting

After the grand jury terminated its investigation, respondent set out to publish a news story—and perhaps a book—about the subject matter of the investigation, a publication which would include respondent's testimony and experiences in dealing with the grand jury. He sued in the United States District Court for the Middle District of Florida, seeking a declaration that § 905.27 was an unconstitutional abridgment of speech, and an injunction preventing the State from prosecuting him. The District Court granted summary judgment to the State, holding that Florida was entitled to make the judgment that a permanent and total ban on the disclosure of witness testimony was necessary to the proper functioning of the grand jury, and that "this is the exceptional case where a severe infringement on rights under the First Amendment is permissible." 678 F. Supp. 1552, 1561 (1988).

The United States Court of Appeals for the Eleventh Circuit reversed. Recognizing that the "question presented by this appeal . . . is a narrow one," the court held that "the pro-

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attorney of the court in which such criminal case is pending, and by him to his assistants, legal associates, and employees, and to the defendant and his attorney, and by the latter to his legal associates and employees. When such disclosure is ordered by a court pursuant to subsection (1) for use in a civil case, it may be disclosed to all parties to the case and to their attorneys and by the latter to their legal associates and employees. However, the grand jury testimony afforded such persons by the court can only be used in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever.

"(3) Nothing in this section shall affect the attorney-client relationship. A client shall have the right to communicate to his attorney any testimony given by the client to the grand jury, any matters involving the client discussed in the client's presence before the grand jury, and any evidence involving the client received by or proffered to the grand jury in the client's presence.

"(4) Persons convicted of violating this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.083, or by fine not exceeding $5,000, or both.

"(5) A violation of this section shall constitute criminal contempt of court."

visions of section 905.27 prohibiting 'any other person' from disclosing the nature of grand jury testimony are unconstitutional to the extent that they apply to witnesses who speak about their own testimony after the grand jury investigation is terminated." 866 F. 2d 1318, 1319, 1321 (1989). While acknowledging that "the freedom of speech afforded by the first amendment is not absolute," the court concluded that the competing state interests were not sufficiently compelling to warrant the imposition of criminal sanctions on witnesses who revealed the content of their own grand jury testimony. *Id.*, at 1319–1320. In reaching its determination, the court relied principally on our decision in *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), and the fact that the Federal Rule of Criminal Procedure governing grand jury secrecy imposes no such obligation on grand jury witnesses. 866 F. 2d, at 1320. We granted certiorari, 493 U. S. 807 (1989), and now affirm.[2]

Historically, the grand jury has served an important role in the administration of criminal justice. Although the English forerunner of the modern grand jury served primarily as a prosecutorial and investigative arm of the Crown and was designed to enhance the government's authority, by the 17th century the grand jury had developed an equally important function—to safeguard citizens against an overreaching Crown and unfounded accusations. See 1 S. Beale & W. Bryson, Grand Jury Law and Practice § 1:02, pp. 5–8 (1986). The tradition of secrecy surrounding grand jury proceedings evolved, at least partially, as a means of implementing this latter function by ensuring the impartiality of that body. *Douglas Oil Co. of California* v. *Petrol Stops Northwest*, 441

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[2] In his complaint, respondent also sought a declaration that he was entitled to divulge his "experience" before the grand jury. Whatever this term might encompass, it is clear that the Court of Appeals limited its holding to a witness' "testimony" before the grand jury. Since respondent has not sought review of any portion of this ruling, we similarly limit our holding to the issue of a witness' grand jury testimony.

U. S. 211, 218–219, n. 9 (1979); Brown, The Witness and Grand Jury Secrecy, 11 Am. J. Crim. Law 169, 170 (1983). Today, grand jury secrecy remains important to safeguard a number of different interests.

> "We consistently have recognized that the proper functioning of our grand jury system depends upon the secrecy of the grand jury proceedings. See, *e. g.*, *United States* v. *Procter & Gamble Co.*, [356 U. S. 677 (1958)]. In particular, we have noted several distinct interests served by safeguarding the confidentiality of grand jury proceedings. First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.*, *supra*, at 218–219 (footnote omitted).

At the same time, we have recognized that the invocation of grand jury interests is not "some talisman that dissolves all constitutional protections." *United States* v. *Dionisio*, 410 U. S. 1, 11 (1973). Indeed, we have noted that grand juries are expected to "operate within the limits of the First Amendment," as well as the other provisions of the Constitution. *Branzburg* v. *Hayes*, 408 U. S. 665, 708 (1972). See also *Wood* v. *Georgia*, 370 U. S. 375 (1962). We must thus balance respondent's asserted First Amendment rights against Florida's interests in preserving the confidentiality of its grand jury proceedings. See *Landmark Com-*

munications, *supra*, at 838 (balancing State's interest in preserving confidentiality of judicial review proceedings against rights of newspaper reporting on such proceedings); *Branzburg*, *supra*, at 690–691 (balancing interest in effective grand jury proceedings against burden on reporters' news gathering from requiring disclosure of sources).

The Court examined the tension between First Amendment rights and government investigatory proceedings in *Landmark Communications*, *supra*. There, a Virginia statute made it a crime to divulge information regarding proceedings before the state judicial review commission. A newspaper publisher was convicted of violating the statute after publishing an article accurately reporting on a pending inquiry by the commission and identifying the state judge under investigation. This Court held that the conviction violated the United States Constitution, concluding "that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment, and the Commonwealth's interests advanced by the imposition of criminal sanctions are insufficient to justify the actual and potential encroachments on freedom of speech and of the press which follow therefrom." *Id.*, at 838. While assuming that the confidentiality of the judicial review proceedings served legitimate state interests, the Court observed that the State had "offered little more than assertion and conjecture to support its claim that without criminal sanctions the objectives of the statutory scheme would be seriously undermined." *Id.*, at 841. The Court also noted that over 40 States with similar judicial review procedures had found it unnecessary to criminalize the type of conduct at issue in order to preserve the integrity of their proceedings. *Ibid.*

Florida argues that our decision in *Seattle Times Co.* v. *Rhinehart*, 467 U. S. 20 (1984), rather than *Landmark*, governs the validity of its prohibition. In *Rhinehart* we held that a protective order prohibiting a newspaper from publishing information which it had obtained through discovery procedures did not offend the First Amendment. Here, by contrast, we deal only with respondent's right to divulge information of which he was in possession before he testified before the grand jury, and not information which he may have obtained as a result of his participation in the proceedings of the grand jury. In such cases, where a person "lawfully obtains truthful information about a matter of public significance," we have held that "state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order." *Smith* v. *Daily Mail Publishing Co.*, 443 U. S. 97, 103 (1979); *Florida Star* v. *B. J. F.*, 491 U. S. 524, 533 (1989).

Here Florida seeks to punish the publication of information relating to alleged governmental misconduct—speech which has traditionally been recognized as lying at the core of the First Amendment. See *Landmark*, 435 U. S., at 838; *Wood*, *supra*, at 388–389, 392. To justify such punishment, Florida relies on the interests in preserving grand jury secrecy acknowledged by the Court in *Douglas Oil Co. of California* v. *Petrol Stops Northwest*, 441 U. S. 211 (1979). But we do not believe those interests warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged. Some of these interests are not served at all by the Florida ban on disclosure, and those that are served are not sufficient to sustain the statute.

When an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape—that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him, on the other.[3] There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over. Similarly, the concern that some witnesses will be deterred from presenting testimony due to fears of retribution is, we think, not advanced by this prohibition; any witness is free *not* to divulge his own testimony, and that part of the Florida statute which prohibits the witness from disclosing the testimony of *another* witness remains enforceable under the ruling of the Court of Appeals.

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[3] In cases where an arrest is contemplated, there may be a lag time between the issuance of the indictment and the arrest. As a result, the Federal Rules of Criminal Procedure and many States have provided a mechanism for the sealing of indictments pending the indictee's arrest. See Fed. Rule Crim. Proc. 6(e)(4); 1 S. Beale & W. Bryson, Grand Jury Law and Practice § 6.40, pp. 232–233, and nn. 2, 3 (1986). Other States, like Flor-

Florida's interest in preventing the subornation of grand jury witnesses who will later testify at trial is served by the prohibition in question to this extent: if the accused is of a mind to suborn potential witnesses against him, he will have an additional opportunity to learn of the existence of such a witness if that witness chooses to make his grand jury testimony public. But with present day criminal procedure generally requiring the disclosure of witnesses on the part of the State, see, *e. g.*, Fla. Rule Crim. Proc. 3.220(a), the names of these witnesses will be available to the accused sometime before trial in any event. Florida provides substantial criminal

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ida, have simply prohibited court officers or grand jurors from disclosing the fact that an indictment has been returned before an arrest is made. *Id.*, § 6.40, p. 233, and n. 4. In such cases, there may be instances where the disclosure by a grand jury witness of his own testimony might lead the accused to infer that he had been indicted from the fact that the witness was asked about the accused's conduct. This would seem to be a very speculative possibility, and it did not lead the drafters of the Federal Rules of Criminal Procedure, nor the majority of States, to impose an obligation of secrecy on grand jury witnesses. See *infra*, at 634–635. We similarly conclude that Florida's interest by reason of this hypothesis is not sufficient to justify the State's postinvestigation ban on a witness' disclosure of his own testimony.

Petitioners argue that the State's interest in preventing a target's flight remains valid in cases where the term of a grand jury expires and an investigation is continued with another grand jury. We are not confronted with this situation in the present case and, accordingly, express no opinion on whether a State could prohibit a witness from revealing his testimony under such circumstances.

penalties for both perjury and tampering with witnesses, see Fla. Stat. §§ 837.02, 914.22 (1989), and its courts have subpoena and contempt powers available to bring recalcitrant witnesses to the stand. We think the additional effect of the ban here in question is marginal at best and insufficient to outweigh the First Amendment interest in speech involved.

Florida undoubtedly retains a substantial interest in seeing that "persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co.*, *supra*, at 219. And the ban in question does serve that interest to some extent, although it would have the opposite effect if applied to a witness who was himself a target of the grand jury probe and desired to publicize this testimony by way of exonerating himself. But even in those situations where the disclosure by the witness of his own testimony could have the effect of revealing the names of persons who had been targeted by the grand jury but exonerated, our decisions establish that absent exceptional circumstances, reputational interests alone cannot justify the proscription of truthful speech. See *Landmark*, *supra*, at 841–842 ("Our prior cases have firmly established . . . that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free") (quotation omitted); cf. *Florida Star* v. *B. J. F.*, *supra* (First Amendment precluded State from imposing damages for publication of rape victim's name); *Smith* v. *Daily Mail Publishing Co.*, *supra* (State could not constitutionally punish the publication of a juvenile offender's name); *Oklahoma Publishing Co.* v. *Oklahoma County District Court*, 430 U. S. 308 (1977) (State could not constitutionally enjoin the publication of a juvenile offender's name).

We also take note of the fact that neither the drafters of the Federal Rules of Criminal Procedure, nor the drafters of similar rules in the majority of the States, found it necessary to impose an obligation of secrecy on grand jury witnesses with respect to their own testimony to protect reputational interests or any of the other interests asserted by Florida. Federal Rule of Criminal Procedure 6(e)(2), governing grand jury secrecy, expressly prohibits certain individuals other than witnesses from disclosing "matters occurring before the grand jury," and provides that "[n]o obligation of secrecy may be imposed on any person except in accordance with this rule." The pertinent Advisory Committee Notes on Rule 6(e)(2), 18 U. S. C. App., p. 726, expressly exempt witnesses from the obligation of secrecy, stating that "[t]he seal of secrecy on witnesses seems an unnecessary hardship and may lead to injustice if a witness is not permitted to make a disclosure to counsel or to an associate." Similarly, only 14 States have joined Florida in imposing an obligation of secrecy on grand jury witnesses. Of the remaining 35 States, 21 either explicitly or implicitly exempt witnesses from a general secrecy obligation, and 14 simply remain silent on the issue. See 2 Beale & Bryson, *supra*, n. 3, § 7.05, pp. 20–21, and nn. 18–21.[4] While these practices are not conclusive as to the constitutionality of Florida's rule, they are probative of the weight to be assigned Florida's asserted interests and the extent to which the prohibition in question is necessary to further them.

Against the state interests which we have just evaluated must be placed the impact of Florida's prohibition on respondent's ability to make a truthful public statement. The effect is dramatic: before he is called to testify in front of the grand jury, respondent is possessed of information on matters of admitted public concern about which he was free to speak at will. After giving his testimony, respondent believes he is no longer free to communicate this information since it relates to the "content, gist, or import" of his testimony. The ban extends not merely to the life of the grand jury but into the indefinite future. The potential for abuse of the Florida prohibition, through its employment as a device to silence those who know of unlawful conduct or irregularities on the part of public officials, is apparent.

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[4] But see Tex. Code Crim. Proc. Ann., Art. 20.16 (Vernon 1977) (imposing obligation of secrecy where Beale & Bryson list as silent).

We agree with the Court of Appeals that the interests advanced by the portion of the Florida statute struck down are not sufficient to overcome respondent's First Amendment right to make a truthful statement of information he acquired on his own. Its judgment is therefore

Affirmed.

JUSTICE SCALIA, concurring.

The Court holds that the Florida statute is unconstitutional "insofar as [it] prohibits a grand jury witness from disclosing his own testimony after the term of the grand jury has ended." *Ante*, at 626. I join the Court's opinion because I interpret that to refer to the information contained within the witness' testimony, but not necessarily to the fact that the witness conveyed that information to the grand jury. I take that to be the meaning of the Court's later clarification that we affirm "respondent's First Amendment right to make a truthful statement of information he acquired on his own." *Ante* this page.

I think there is considerable doubt whether a witness can be prohibited, even while the grand jury is sitting, from making public what he knew before he entered the grand jury room. Quite a different question is presented, however, by a witness' disclosure of the grand jury proceedings, which is knowledge he acquires not "on his own" but only by virtue of being made a witness. And it discloses those proceedings for the witness to make public, not what he knew, but what it was he told the grand jury he knew. There may be quite good reasons why the State would want the latter information—which is in a way information of the State's own creation—to remain confidential even after the term of the grand jury has expired. It helps to assure, for one thing, that grand jurors will not be intimidated in the execution of their duties by the fear of unjustified public criticism to which they cannot respond. To allow them to respond, on the other hand—by denying that the witness in fact said what he claims to have said, or by pointing out the contradictory testimony of other witnesses—would have its own adverse effects, including the subjection of grand jurors to a degree of press attention and public prominence that might in the long run deter citizens from fearless performance of their grand jury service. I do not say that these state interests are necessarily sufficient, but only that they are not presented by the narrow question we decide today.

ADAMS FRUIT CO., INC. *v.* BARRETT ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 88-2035. Argued January 17, 1990—Decided March 21, 1990

Respondents, migrant farmworkers employed by petitioner, received benefits under Florida workers' compensation law for injuries they suffered in an automobile accident while traveling to work in petitioner's van. They subsequently filed suit against petitioner in Federal District Court, alleging that their injuries were attributable in part to petitioner's intentional violations of the motor vehicle safety provisions of the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U. S. C. § 1801 *et seq.*, and accompanying regulations. They sought actual and statutory damages for such violations pursuant to AWPA's private right of action provision, § 1854. The court granted petitioner summary judgment on the ground that the state workers' compensation law provides that its remedy is exclusive, and that respondents' receipt of benefits under that law therefore precluded them from recovering damages under AWPA for the same injuries. The Court of Appeals reversed, holding that such an exclusivity provision does not bar a private AWPA suit.

Held: Exclusivity provisions in state workers' compensation laws do not bar migrant workers from availing themselves of a private right of action under § 1854. Pp. 642–651.

(a) The explicit language of AWPA's enforcement provisions—which establishes a private right of action for "[a]ny person aggrieved by a violation," § 1854(a)—indicates that that right is unaffected by the availability of remedies under state workers' compensation law. A congressional intent to the contrary is not established by AWPA's motor vehicle safety provisions, which permit employers to satisfy the statute's insurance and liability bond requirements through their state workers' compensation insurance. The safety provisions appear in a Title far removed from the enforcement provisions, and the latter provisions contain Congress' sole express limitation on the availability of relief, which applies where no attempt was made to resolve the disputed issues before litigation. Had Congress intended to limit further the availability of AWPA relief based on the adequacy of state workers' compensation remedies, it would have made that purpose clear in AWPA's enforcement provisions. Moreover, the insurance waiver provision is not inconsistent with the availability of overlapping remedies under workers' compensation laws and AWPA, since the agricultural employer, whether or not it has enrolled in a workers' compensation plan, will be liable under AWPA's enforcement provisions if the employee's actual damages exceed the required minimum insurance coverage. Although Congress may *choose* to establish state remedies as adequate alternatives to federal relief, it cannot be assumed that private federal rights of action are conditioned on the unavailability of state remedies absent some indication to that effect. Cases in which this Court has harmonized *federal* statutes that provide overlapping *federal* remedies are not to the contrary. Pp. 643–647.

(b) AWPA pre-empts state law to the limited extent that it does not permit States to supplant, rather than to supplement, the statute's remedial scheme. Section 1871—which provides that AWPA "is intended to supplement State law, and compliance with [the statute] shall not excuse any person from compliance with appropriate State law and regulation"—does not require this Court to give effect to the Florida exclusivity provision, even if that provision were intended to withdraw AWPA's private right of action. Although § 1871 permits States to supplement the statute's remedial scheme, it cannot be viewed as authorizing them to replace or supersede AWPA remedies. Petitioner's claim that Congress intended to preserve the particular balance state workers' compensation laws generally strike between assurance of compensation and limited and exclusive employer liability is off target, since the fact that AWPA may affect that balance does not suggest that Congress intended AWPA's remedial provisions to be effective only in certain States. Federal law applies in all States, and the scope of federal law is not curtailed where it conflicts with the policies purportedly underlying some state regulatory schemes. State exclusivity provisions that attempt to withdraw federal remedies directly conflict with the federal scheme's purposes and cannot be viewed as permissible interstitial regulation. Pp. 647–649.

(c) Even if AWPA's language establishing a private right of action is ambiguous as to the statute's pre-emptive scope, this Court need not defer to the Department of Labor's position that state workers' compensation benefits, where applicable, are the exclusive remedy for loss under the statute. Congress expressly established the Judiciary and not the Department as the adjudicator of AWPA private rights of action, and the Department's statutory authorization to promulgate motor vehicle safety *standards* cannot bootstrap that agency into an area in which it has no jurisdiction. Pp. 649–650.

867 F. 2d 1305, affirmed.

MARSHALL, J., delivered the opinion for a unanimous Court.

Bonita L. Kneeland argued the cause for petitioner. With her on the briefs was *John W. Robinson.*

Laurence H. Tribe argued the cause for respondents. With him on the brief were *Brian Stuart Koukoutchos* and *Nora Leto.**

JUSTICE MARSHALL delivered the opinion of the Court.

In this case we must decide whether exclusivity provisions in state workers' compensation laws bar migrant workers from availing themselves of a private right of action under the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 96 Stat. 2583, as amended, 29 U. S. C. § 1801 *et seq.* (1982 ed. and Supp. V). We hold that they do not.

I

Respondents, migrant farmworkers employed by petitioner Adams Fruit Company, Inc., suffered severe injuries in an automobile accident while they traveled to work in Adams Fruit's van. As a result of their injuries, respondents received benefits pursuant to Florida workers' compensation law. They thereafter filed suit against Adams Fruit in Federal District Court, alleging that their injuries were attributable in part to Adams Fruit's intentional violations of AWPA's motor vehicle safety provisions, 29 U. S. C. § 1841(b)(1)(A) (1982 ed.), and accompanying regulations, 29

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*Briefs of *amici curiae* urging reversal were filed for the American Farm Bureau Federation et al. by *James D. Holzhauer* and *John J. Rademacher;* and for the California Workers' Compensation Institute by *Michael A. Marks.*

Briefs of *amici curiae* urging affirmance were filed for the State of Texas et al. by *Jim Mattox,* Attorney General of Texas, *Mary F. Keller,* First Assistant Attorney General, and *Renea Hicks,* Special Assistant Attorney General, *John K. Van de Kamp,* Attorney General of California, and *James M. Shannon,* Attorney General of Massachusetts; and for Congressman William D. Ford et al. by *Melvin C. Garbow* and *Melvin Spaeth.*

James N. Westwood filed a brief for John I. Haas, Inc., as *amicus curiae.*

CFR § 500.105 (1989). Respondents maintained that the van in which they were transported was inadequate to support the vehicle's weight; that the total number of persons in the van exceeded its seating capacity; that a seat was not provided for each passenger; that the van was overloaded; that the seats in the van were not equipped with seat belts; and that Adams Fruit committed these violations intentionally. Respondents sought actual and statutory damages pursuant to AWPA's private right of action provision, 29 U. S. C. § 1854 (1982 ed.).[1]

Adams Fruit moved for summary judgment on the ground that Florida law provides that its workers' compensation remedy "shall be exclusive and in place of all other liability of such employer to . . . the employee," Fla. Stat. § 440.11 (1989), and that respondents' receipt of workers' compensation benefits therefore precluded them from recovering damages under AWPA for the same injuries. In support of its position, Adams Fruit maintained that Congress did not, in creating a private right of action for migrant workers, intend to pre-empt or interfere with the operation of state workers' compensation schemes, including their exclusivity provisions. The District Court granted petitioner's motion, relying on the Fourth Circuit's decision in *Roman* v. *Sunny Slope*

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[1] Section 1854(a) provides:

"Any person aggrieved by a violation of this chapter or any regulation under this chapter by a farm labor contractor, agricultural employer, agricultural association, or other person may file suit in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy and without regard to the citizenship of the parties and without regard to exhaustion of any alternative administrative remedies provided herein."

Section 1854(c)(1) provides:

"If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief . . . ."

Farms, Inc., 817 F. 2d 1116, 1118 (1987). The Court of Appeals for the Eleventh Circuit reversed, holding that an exclusivity provision in a state workers' compensation law does not bar a private suit under AWPA. 867 F. 2d 1305, 1311 (1989). We granted certiorari to resolve this split in authority, 493 U. S. 808 (1989), and now affirm.

II

Section 504 of AWPA establishes a private right of action for aggrieved migrant workers against agricultural employers and provides for actual and statutory damages in cases of intentional violations. Resolution of petitioner's claim that AWPA's private right of action is withdrawn where state law establishes workers' compensation as an exclusive remedy depends on two doctrinally related issues. First we must decide whether, as a matter of statutory construction, AWPA permits migrant workers to pursue federal remedies under such circumstances. Second, if AWPA permits simultaneous recovery under federal and state law, we must determine whether, under pre-emption principles, AWPA precludes giving effect to state exclusivity provisions that purport to withdraw federal remedies. In either case, the issue turns on the language of the statute and, where the language is not dispositive, on the intent of Congress as revealed in the history and purposes of the statutory scheme. See, *e. g.*, *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself"); *Shaw* v. *Delta Air Lines, Inc.*, 463 U. S. 85, 95 (1983) ("[I]n deciding whether a federal law pre-empts a state statute, our task is to ascertain Congress' intent in enacting the federal statute at issue"). As a general rule of statutory construction, where the terms of a statute are unambiguous, judicial inquiry is complete. See, *e. g.*, *Rubin* v. *United States*, 449 U. S. 424, 430 (1981). Pre-emption "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones* v. *Rath Packing Co.*, 430 U. S. 519, 525 (1977).

A

The enforcement provisions of AWPA that establish a private right of action for "[a]ny person aggrieved by a violation" of the Act's provisions or accompanying regulations, 29 U. S. C. § 1854(a) (1982 ed.), in no way intimate that the availability of that right is affected by state workers' compensation law. Adams Fruit nevertheless contends that the language of AWPA's enforcement provisions is not dispositive because other provisions of the statute reflect congressional intent to withdraw private rights of action where state workers' compensation is available.

Adams Fruit's argument focuses on § 1841, which concerns motor vehicle safety. Subsections (a) and (b) of § 1841 establish minimum standards, licensing, and insurance requirements to help secure safe transportation for migrant and seasonal agricultural workers. As part of these protections, subsection (b)(1)(C) requires each agricultural employer to "have an insurance policy or a liability bond . . . which insures the agricultural employer . . . against liability for damage to persons or property arising from the ownership, operation, or the causing to be operated, of any vehicle used to transport any migrant or seasonal agricultural worker." Subsection (c) waives this insurance requirement where an agricultural employer "is the employer of any migrant or seasonal agricultural worker for purposes of a State workers' compensation law." In such cases, "[n]o insurance policy or liability bond [is] required of the employer" if the migrant workers are transported solely under circumstances for which there is coverage under such state law.

Adams Fruit maintains that Congress' decision to permit agricultural employers to satisfy AWPA's insurance policy and liability bond requirements through their state workers' compensation insurance reflects an intent to preclude AWPA liability for bodily injury where employers have obtained coverage under state law. In Adams Fruit's view, it would be incongruous for Congress explicitly to waive insurance coverage requirements where workers' compensation is available and at the same time to allow migrant workers to seek cumulative remedies under workers' compensation laws and AWPA. So construed, Adams Fruit argues, the statute creates a trap for the unwary agricultural employer, who reasonably could have expected the waiver of insurance requirements to reflect a waiver of liability as well.

Adams Fruit's argument is unpersuasive because it rests on the extraordinary and unjustified proposition that congressional intent regarding private enforcement of AWPA is best discerned through a meaning alleged to be implicit in AWPA's motor vehicle safety provisions rather than the explicit language of AWPA's enforcement provisions. AWPA's motor vehicle safety provisions appear in Title IV of the Act, entitled "Further Protections for Migrant and Seasonal Agricultural Workers," whereas AWPA's provision for a private right of action appears in Title V, part A, labeled "Enforcement Provisions." Moreover, Congress' sole express limitation on the availability of relief is found in AWPA's enforcement provisions. See § 1854(c)(2) (authorizing a court, "[i]n determining the amount of damages to be awarded . . . , to consider whether an attempt was made to resolve the issues in dispute before the resort to litigation"). Had Congress intended to limit further the availability of AWPA relief based on the adequacy of state workers' compensation remedies, it would have made that purpose clear in the enforcement provisions of AWPA.[2] Petitioner's argument, which relies on provisions far removed from Congress' express authorization of a federal remedy, is inconsistent with basic principles of statutory construction that require giving effect to the meaning and placement of the words chosen by Congress. See *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 813 (1989).

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[2] In other statutes, Congress has expressed clearly its intent to limit the availability of a federal remedy where a claimant has received workers' compensation benefits related to the same injury. See, *e. g.*, 56 Stat. 1032, 42 U. S. C. § 1705(a) (1982 ed.) (providing that "[n]o benefits shall be paid or furnished under [the War Hazards Compensation Act] for injury or death to any person who recovers or receives workmen's compensation benefits for the same injury or death under . . . the law of any State").

Adams Fruit's argument is also flawed in that the insurance waiver provision is not inconsistent with the availability of overlapping remedies under workers' compensation laws and AWPA. It is true that, in accordance with § 1841(c)(1)'s waiver of insurance requirements, an agricultural employer will not be in violation of AWPA if it fails to obtain insurance sufficient to cover its potential liability as long as the employer maintains insurance under state workers' compensation law. But the possibility of underinsurance is also present where an employer is *not* enrolled in a workers' compensation plan. AWPA limits the insurance that agricultural employers must carry, 29 U. S. C. § 1841(b)(3) (1982 ed.); if a claim exceeds the required coverage, an employer is nonetheless liable for the whole claim. § 1854(c)(1) (authorizing damages "up to and including an amount equal to the amount of actual damages"); see also 128 Cong. Rec. 32463 (1982) ("[F]ull actual damages [are to] be awarded in every case"). In this respect, AWPA does not differ from other mandatory insurance regimes that require a minimum level of coverage without establishing an absolute limit on liability. Thus, Congress' decisions to allow workers' compensation insurance to satisfy § 1841(b)'s minimum coverage requirements on the one hand, and to afford migrant workers federal and state remedies that may exceed such coverage on the other, are not incompatible; indeed, the decisions are consistent with AWPA's treatment of agricultural employers who are not exempted from § 1841(b)'s insurance and bond requirements.[3]

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[3] For similar reasons, we reject Adams Fruit's claim that the refusal to exempt employers from AWPA liability where they have obtained workers' compensation coverage upsets employers' reasonable expectations re-

We likewise reject petitioner's contention that, where Congress authorizes a private right of action to vindicate a federal right, we should assume that Congress has conditioned that right on the unavailability of a state remedy. Indeed, we have stated that "it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *NLRB* v. *Natural Gas Utility District of Hawkins County*, 402 U. S. 600, 603 (1971) (internal quotation marks and citation omitted). Congress may *choose* to establish state remedies as adequate alternatives to federal relief, but federal rights should be regarded as supplementing state-created rights unless otherwise indicated. See, *e. g.*, *Gomez* v. *Toledo*, 446 U. S. 635, 639 (1980) (construing 42 U. S. C. § 1983); *Tennessee C., I. & R. Co.* v. *Muscoda Local No. 123*, 321 U. S. 590, 597 (1944) (construing Fair Labor Standards Act).

Cases in which this Court has harmonized *federal* statutes that provide overlapping *federal* remedies, see, *e. g.*, *United States* v. *Demko*, 385 U. S. 149 (1966), are not to the contrary. In *Demko*, this Court held that the existence of a comprehensive federal scheme for compensating injured prisoners precluded supplemental recovery under the Federal Tort Claims Act. A finding that a specific federal remedy trumps a more general federal remedy may be appropriate in certain circumstances, but that conclusion is a far cry from a presumption that a general state remedy invariably trumps a specific federal one.

Accordingly, the plain meaning of the statute's language indicates that AWPA's private right of action is unaffected

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garding liability. Because the insurance requirements of § 1841 establish a floor of coverage rather than a ceiling of liability, employers' expectations to the contrary are unreasonable. Moreover, to the extent that Adams Fruit's argument rests on equitable considerations, no inequity occurs where, as here, a predicate for liability is an intentional violation of the law. See 29 U. S. C. § 1854(c)(1) (1982 ed.).

by the availability of remedies under state workers' compensation law.

B

Adams Fruit also contends that Congress did not intend to pre-empt States from establishing their workers' compensation schemes as the exclusive mechanism to redress injuries to migrant workers. In support of this position, Adams Fruit points to 29 U. S. C. § 1871 (1982 ed.), which provides that the statute "is intended to supplement State law, and compliance with this chapter shall not excuse any person from compliance with appropriate State law and regulation." On the basis of this provision, Adams Fruit argues that this Court must give effect to the exclusivity provision in Florida's statute, which it construes as withdrawing AWPA's private right of action.

We disagree that Florida's exclusivity provision is intended to preclude federal remedies. Neither the Florida Legislature nor the Florida courts have declared such a purpose; indeed, to the limited extent that the Florida Supreme Court has expressed a view regarding the extraterritorial scope of the exclusivity provision, it has stated the opposite. See *Byrd* v. *Richardson-Greenshields Securities, Inc.*, 552 So. 2d 1099, 1102 (1989) (refusing to frustrate federal and state sexual harassment policies through "blind adherence to the exclusivity rule of the workers' compensation statute alone" and expressing its commitment "not [to] apply the exclusivity rule in a manner that effectively abrogates the policies of other law"). We therefore decline petitioner's invitation to construe Florida law so as to create a conflict between federal and state legislation.[4]

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[4] The States of California and Texas and the Commonwealth of Massachusetts—appearing as *amici curiae* for respondents—have urged this Court to affirm the decision below. Each "has a provision in its state workers' compensation statute making workers' recovery for personal injuries under the state workers' insurance system the exclusive mechanism for personal injury compensation," and each declares an interest in "pre-

Even if Florida's provision were directed at federal law, § 1871 does not mandate displacement of the federal remedy. Although that section permits States to supplement AWPA's remedial scheme, it cannot be viewed as authorizing States to replace or supersede its remedies. Nor are we persuaded by petitioner's claim that Congress intended to preserve the particular balance state workers' compensation statutes generally strike between assurance of compensation on the one hand and limited and exclusive liability for the employer on the other. Whatever the merits of this characterization of the purposes of workers' compensation, the point is off target. That congressional authorization of a federal remedy may affect the balance struck in state regulatory schemes does not suggest that Congress intended its remedial provisions to be effective only in certain States. Federal legislation applies in all States, and in cases of conflict between federal law and the policies purportedly underlying some state regulatory schemes, the scope of federal law is not curtailed.

More generally, we refuse to adopt Adams Fruit's "reverse" pre-emption principle that would authorize States to withdraw federal remedies by establishing state remedies as exclusive. Such provisions cannot be viewed as permissible interstitial regulation in the service of, or at least neutral with respect to, the purposes of the federal scheme. Cf. *Mackey* v. *Lanier Collections Agency & Service, Inc.*, 486 U. S. 825, 834–838 (1988) (where federal law does not establish an enforcement mechanism for collecting ERISA judgments, state mechanisms not pre-empted); *Robertson* v. *Wegmann*, 436 U. S. 584, 594 (1978) (application of state survivorship rule to 42 U. S. C. § 1983 is not pre-empted because rule does not impair federally secured right). Rather, they directly conflict with the purposes of the federal statute.

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vent[ing] its principal statutory mechanism for the recompense of injured migrant workers from being transmuted into a contraption destroying federal protection for those same workers." Brief for Texas et al. as *Amici Curiae* 1–2.

Accordingly, we find that AWPA pre-empts state law to the limited extent that it does not permit States to supplant, rather than to supplement, AWPA's remedial scheme.

C

Adams Fruit argues that, in the absence of any explicit congressional statement regarding the pre-emptive scope of AWPA, this Court should defer to the Department of Labor's position that "[w]here a State workers' compensation law is applicable and coverage is provided for a migrant or seasonal agricultural worker by the employer, the workers' compensation benefits are the exclusive remedy for loss under this Act in the case of bodily injury or death." 29 CFR § 500.122(b) (1989).

As an initial matter, we reject petitioner's view that AWPA's failure to speak directly to the pre-emption of state exclusivity provisions creates a statutory "gap" within the meaning of *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984), that Congress intended the Department of Labor to fill. A "gap" is not created in a statutory scheme merely because a statute does not restate the truism that States may not pre-empt federal law.

Moreover, even if AWPA's language establishing a private right of action is ambiguous, we need not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute. A precondition to deference under *Chevron* is a congressional delegation of administrative authority. *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204, 208 (1988). See also *NLRB* v. *Food and Commercial Workers*, 484 U. S. 112, 123 (1987) (*Chevron* review of agency interpretations of statutes applies only to regulations "promulgated pursuant to congressional authority"); *Crandon* v. *United States*, 494 U. S. 152, 177 (1990) (SCALIA, J., concurring in judgment) (rejecting *Chevron* deference where the statute "is not administered by any agency but by the courts"); cf. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 97 (1983) (refusing to sanction "'unauthorized assumption by an agency of major policy decisions'" (quoting *American Ship Building Co.* v. *NLRB*, 380 U. S. 300, 318 (1965)). No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of § 1854 to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy.

Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate *standards* implementing AWPA's motor vehicle provisions. § 1841(d). This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction." *Federal Maritime Comm'n* v. *Seatrain Lines, Inc.*, 411 U. S. 726, 745 (1973); *SEC* v. *Sloan*, 436 U. S. 103, 119 (1978) (same); cf. *Adamo Wrecking Co.* v. *United States*, 434 U. S. 275, 288, n. 5 (1978) (rejecting "Administrator's unexplained exercise of supposed authority"). Accordingly, the Secretary's conclusion that workers' compensation benefits, where available, provide the exclusive remedy for violations of AWPA is not entitled to *Chevron* deference.

III

Our review of the language and structure of AWPA leads us to conclude that AWPA does not establish workers' compensation benefits as an exclusive remedy under § 1854, even where state workers' compensation schemes purport to establish their benefits as exclusive of all other relief.[5] Accordingly, the decision of the Court of Appeals is affirmed.

It is so ordered.

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[5] We agree with the court below that an award of actual damages under AWPA may be offset in light of a farmworker's receipt of benefits under state workers' compensation law.

AUSTIN, MICHIGAN SECRETARY OF STATE, ET AL. *v.* MICHIGAN STATE CHAMBER OF COMMERCE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 88-1569. Argued October 31, 1989—Decided March 27, 1990

Appellee Michigan State Chamber of Commerce (Chamber) is a nonprofit corporation, whose bylaws set forth both political and nonpolitical purposes. Its general treasury is funded through annual dues required of all members, three-quarters of whom are for-profit corporations. Section 54(1) of the Michigan Campaign Finance Act prohibits corporations, excluding media corporations, from using general treasury funds for, *inter alia*, independent expenditures in connection with state candidate elections. However, they may make such expenditures from segregated funds used solely for political purposes. Because the Chamber wished to use general treasury funds to place a local newspaper advertisement in support of a specific candidate for state office, it brought suit in the Federal District Court for injunctive relief against § 54(1)'s enforcement, arguing that the expenditure restriction is unconstitutional under the First and Fourteenth Amendments. The court upheld the section, but the Court of Appeals reversed, reasoning that, as applied to the Chamber, § 54(1) violated the First Amendment.

Held:

1. Section 54(1) does not violate the First Amendment. Pp. 657–666.

(a) Although § 54(1)'s requirements burden the Chamber's exercise of political expression, see *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238, 252 *(MCFL)*, they are justified by a compelling state interest: preventing corruption or the appearance of corruption in the political arena by reducing the threat that huge corporate treasuries, which are amassed with the aid of favorable state laws and have little or no correlation to the public's support for the corporation's political ideas, will be used to influence unfairly election outcomes. Pp. 657–660.

(b) Section 54(1) is sufficiently narrowly tailored to achieve its goal, because it is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views by making expenditures through separate segregated funds. Because persons who contribute to segregated funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views. The fact that § 54(1) covers closely held corporations that do not possess vast reservoirs of capital does not make it substantially overinclusive, because all corporations receive the special benefits conferred by the corporate form and thus present the potential for distorting the political process. Cf. *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 209–210. Pp. 660–661.

(c) There is no merit to the Chamber's argument that even if § 54(1) is constitutional with respect to for-profit corporations, it cannot be applied to a nonprofit ideological corporation such as itself. The Chamber does not exhibit the crucial features identified in *MCFL*, *supra*, that would require the State to exempt it from independent spending burdens as a nonprofit corporation more akin to a voluntary political association than a business firm. MCFL's narrow focus on the promotion of political ideas ensured that its resources reflected political support, while the Chamber's more varied bylaws do not. Additionally, unlike MCFL members, the Chamber's members are similar to shareholders—who have an economic disincentive for disassociating with a corporation even if they disagree with its political activity—in that they may be reluctant to withdraw from the Chamber because they wish to benefit from its nonpolitical programs and to establish contacts with other members of the business community. Also in contrast to MCFL, which took no contributions from business corporations, more than three-quarters of the Chamber's members are business corporations, whose political contributions and expenditures can constitutionally be regulated by the State, and who thus could circumvent § 54(1)'s restriction by funneling money through the Chamber's general treasury. Pp. 661–665.

(d) Section 54(1) is not rendered underinclusive by its failure to regulate the independent expenditures of unincorporated labor unions that also have the capacity to accumulate wealth, because the exclusion does not undermine the State's compelling interest in regulating corporations whose unique form enhances such capacity. Moreover, because members who disagree with a union's political activities can decline to contribute to them without giving up other membership benefits, a union's political funds more accurately reflect members' support for the organization's political views than does a corporation's general treasury. Pp. 665–666.

2. Section 54(1) does not violate the Equal Protection Clause of the Fourteenth Amendment. Even under strict scrutiny, its classifications pass muster. The State's decision to regulate corporations and not unincorporated associations is precisely tailored to serve its compelling interest. Similarly, the exemption of media corporations does not render the section unconstitutional. Restrictions on the expenditures of corporations whose resources are devoted to the collection and dissemination of information to the public might discourage news broadcasters or

publishers from serving their crucial societal role of reporting on and publishing editorials about newsworthy events; thus, their exemption from the section's restriction is justified. Pp. 666–668.

856 F. 2d 783, reversed.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, BLACKMUN, and STEVENS, JJ., joined. BRENNAN, J., *post*, p. 669, and STEVENS, J., *post*, p. 678, filed concurring opinions. SCALIA, J., filed a dissenting opinion, *post*, p. 679. KENNEDY, J., filed a dissenting opinion, in which O'CONNOR and SCALIA, JJ., joined, *post*, p. 695.

Louis J. Caruso, Solicitor General of Michigan, argued the cause for appellants. With him on the briefs were *Frank J. Kelley*, Attorney General, *pro se*, *Thomas L. Casey*, Assistant Solicitor General, and *Gary P. Gordon* and *Richard P. Gartner*, Assistant Attorneys General.

Richard D. McLellan argued the cause for appellee. With him on the brief were *Joel M. Boyden*, *William J. Perrone*, and *Cindy M. Wilder*.*

JUSTICE MARSHALL delivered the opinion of the Court.

In this appeal, we must determine whether § 54(1) of the Michigan Campaign Finance Act, 1976 Mich. Pub. Acts 388, violates either the First or the Fourteenth Amendment to the Constitution. Section 54(1) prohibits corporations from using corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate in elections for state office. Mich. Comp. Laws § 169.254(1) (1979). Cor-

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*Briefs of *amici curiae* urging reversal were filed for the Federal Election Commission by *Lawrence M. Noble* and *Richard B. Bader;* and for Common Cause by *Roger M. Witten*, *Carol F. Lee*, and *Archibald Cox*.

Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union by *Arthur B. Spitzer*, *John A. Powell*, and *Joel M. Gora;* for the American Medical Association et al. by *Michael A. Nemeroff*, *Carter G. Phillips*, and *Mark D. Hopson;* for the Center for Public Interest Law by *Robert C. Fellmeth;* and for the Washington Legal Foundation et al. by *Daniel J. Popeo* and *Paul D. Kamenar*.

Thomas J. Hart filed a brief of *amici curiae* for the National Organization for Women et al.

porations are allowed, however, to make such expenditures from segregated funds used solely for political purposes. § 169.255(1). In response to a challenge brought by the Michigan State Chamber of Commerce (Chamber), the Sixth Circuit held that § 54(1) could not be applied to the Chamber, a Michigan nonprofit corporation, without violating the First Amendment. 856 F. 2d 783 (1988). Although we agree that expressive rights are implicated in this case, we hold that application of § 54(1) to the Chamber is constitutional because the provision is narrowly tailored to serve a compelling state interest. Accordingly, we reverse the judgment of the Court of Appeals.

I

Section 54(1) of the Michigan Campaign Finance Act prohibits corporations from making contributions and independent expenditures in connection with state candidate elections.[1] The issue before us is only the constitutionality of the State's ban on independent expenditures. The Act defines "expenditure" as "a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate." § 169.206(1). An expenditure is considered independent if it is "not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." § 169.209(1); see § 169.203(4) (defining "committee" as a group that "receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate"). The Act exempts from this general prohibition against corporate political spending any expenditure made from a segregated fund.

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[1] Section 54(1) is modeled on a provision of the Federal Election Campaign Act of 1971, 86 Stat. 11, as amended, 2 U. S. C. §§ 431–455, that requires corporations and labor unions to use segregated funds to finance independent expenditures made in federal elections. § 441b.

§ 169.255(1). A corporation may solicit contributions to its political fund only from an enumerated list of persons associated with the corporation. See §§ 169.255(2), (3).

The Chamber, a nonprofit Michigan corporation, challenges the constitutionality of this statutory scheme. The Chamber comprises more than 8,000 members, three-quarters of whom are for-profit corporations. The Chamber's general treasury is funded through annual dues required of all members. Its purposes, as set out in the bylaws, are to promote economic conditions favorable to private enterprise; to analyze, compile, and disseminate information about laws of interest to the business community and to publicize to the government the views of the business community on such matters; to train and educate its members; to foster ethical business practices; to collect data on, and investigate matters of, social, civic, and economic importance to the State; to receive contributions and to make expenditures for political purposes and to perform any other lawful political activity; and to coordinate activities with other similar organizations.

In June 1985 Michigan scheduled a special election to fill a vacancy in the Michigan House of Representatives. Although the Chamber had established and funded a separate political fund, it sought to use its general treasury funds to place in a local newspaper an advertisement supporting a specific candidate. As the Act made such an expenditure punishable as a felony, see § 169.254(5), the Chamber brought suit in District Court for injunctive relief against enforcement of the Act, arguing that the restriction on expenditures is unconstitutional under both the First and the Fourteenth Amendments.

The District Court upheld the statute. 643 F. Supp. 397 (WD Mich. 1986). The Sixth Circuit reversed, reasoning that the expenditure restriction, as applied to the Chamber, violated the First Amendment. We noted probable jurisdiction, 490 U. S. 1045 (1989), and now reverse.

II

To determine whether Michigan's restriction on corporate political expenditures may constitutionally be applied to the Chamber, we must ascertain whether it burdens the exercise of political speech and, if it does, whether it is narrowly tailored to serve a compelling state interest. *Buckley* v. *Valeo*, 424 U. S. 1, 44–45 (1976) *(per curiam)*. Certainly, the use of funds to support a political candidate is "speech"; independent campaign expenditures constitute "political expression 'at the core of our electoral process and of the First Amendment freedoms.'" *Id.*, at 39 (quoting *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968)). The mere fact that the Chamber is a corporation does not remove its speech from the ambit of the First Amendment. See, *e. g.*, *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 777 (1978).

A

This Court concluded in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986) *(MCFL)*, that a federal statute requiring corporations to make independent political expenditures only through special segregated funds, 2 U. S. C. § 441b, burdens corporate freedom of expression. *MCFL*, 479 U. S., at 252 (plurality opinion); *id.*, at 266 (O'CONNOR, J., concurring in part and concurring in judgment). The Court reasoned that the small nonprofit corporation in that case would face certain organizational and financial hurdles in establishing and administering a segregated political fund. For example, the statute required the corporation to appoint a treasurer for its segregated fund, keep records of all contributions, file a statement of organization containing information about the fund, and update that statement periodically. *Id.*, at 253 (plurality opinion). In addition, the corporation was permitted to solicit contributions to its segregated fund only from "members," which did not include persons who merely contributed to or indicated support for the organization. *Id.*, at 254 (plurality opinion).

These hurdles "impose[d] administrative costs that many small entities [might] be unable to bear" and "create[d] a disincentive for such organizations to engage in political speech." *Ibid;* see also *id.*, at 265–266 (O'CONNOR, J.).

Despite the Chamber's success in administering its separate political fund, see, *e. g.*, Tr. 443 (Chamber expected to have over $140,000 in its segregated fund available for use in the 1986 elections), Michigan's segregated fund requirement still burdens the Chamber's exercise of expression because "the corporation is *not* free to use its general funds for campaign advocacy purposes." *MCFL, supra,* at 252 (plurality opinion). The Act imposes requirements similar to those in the federal statute involved in *MCFL:* a segregated fund must have a treasurer, § 169.221; and its administrators must keep detailed accounts of contributions, § 169.224, and file with state officials a statement of organization, *ibid.* In addition, a nonprofit corporation like the Chamber may solicit contributions to its political fund only from members, stockholders of members, officers or directors of members, and the spouses of any of these persons. § 169.255. Although these requirements do not stifle corporate speech entirely, they do burden expressive activity. See *MCFL,* 479 U. S., at 252 (plurality opinion); *id.*, at 266 (O'CONNOR, J.). Thus, they must be justified by a compelling state interest.

B

The State contends that the unique legal and economic characteristics of corporations necessitate some regulation of their political expenditures to avoid corruption or the appearance of corruption. See *FEC* v. *National Conservative Political Action Committee,* 470 U. S. 480, 496–497 (1985) *(NCPAC)* ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances"). State law grants corporations special advantages—such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets—that enhance their ability to attract capital and to deploy their resources in ways that maximize the return on their shareholders' investments. These state-created advantages not only allow corporations to play a dominant role in the Nation's economy, but also permit them to use "resources amassed in the economic marketplace" to obtain "an unfair advantage in the political marketplace." *MCFL*, 479 U. S., at 257. As the Court explained in *MCFL*, the political advantage of corporations is unfair because

> "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas. They reflect instead the economically motivated decisions of investors and customers. The availability of these resources may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." *Id.*, at 258.

We therefore have recognized that "the compelling governmental interest in preventing corruption support[s] the restriction of the influence of political war chests funneled through the corporate form." *NCPAC*, *supra*, at 500–501; see also *MCFL*, *supra*, at 257.

The Chamber argues that this concern about corporate domination of the political process is insufficient to justify a restriction on independent expenditures. Although this Court has distinguished these expenditures from direct contributions in the context of federal laws regulating individual donors, *Buckley*, 424 U. S., at 47, it has also recognized that a legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to influence candidate elections, *Bellotti*, *supra*, at 788, n. 26. Regardless of whether this danger of "financial *quid pro quo*" corruption, see *NCPAC*, *supra*, at 497; *post*, at 702–705 (KENNEDY, J., dissenting), may be sufficient to justify a restriction on independent expenditures, Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas. See *supra*, at 658–659. The Act does not attempt "to equalize the relative influence of speakers on elections," *post*, at 705 (KENNEDY, J., dissenting); see also *post*, at 684 (SCALIA, J., dissenting); rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations. We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for § 54; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations.

C

We next turn to the question whether the Act is sufficiently narrowly tailored to achieve its goal. We find that the Act is precisely targeted to eliminate the distortion caused by corporate spending while also allowing corporations to express their political views. Contrary to the dissents' critical assumptions, see *post*, at 698, 699, 706 (KENNEDY, J.); *post*, at 680, 682–683 (SCALIA, J.), the Act does not impose an *absolute* ban on all forms of corporate political spending but permits corporations to make independent political expenditures through separate segregated funds. Because persons contributing to such funds understand that their money will be used solely for political purposes, the speech generated accurately reflects contributors' support for the corporation's political views. See *MCFL, supra,* at 258.

The Chamber argues that § 54(1) is substantially overinclusive, because it includes within its scope closely held corporations that do not possess vast reservoirs of capital. We rejected a similar argument in *FEC* v. *National Right to Work Committee,* 459 U. S. 197 (1982) *(NRWC),* in the context of federal restrictions on the persons from whom corporations could solicit contributions to their segregated funds. The Court found that the federal campaign statute, 2 U. S. C. § 441b, "reflect[ed] a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation. While § 441b restricts the solicitation of corporations and labor unions without great financial resources, as well as those more fortunately situated, we accept Congress' judgment that it is the *potential* for such influence that demands regulation." 459 U. S., at 209–210 (citation omitted; emphasis added). Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies § 54(1)'s general applicability to all corporations. The section therefore is not substantially overbroad.

III

The Chamber contends that even if the Campaign Finance Act is constitutional with respect to for-profit corporations, it nonetheless cannot be applied to a nonprofit ideological corporation like a chamber of commerce. In *MCFL,* we held that the nonprofit organization there had "features more akin to voluntary political associations than business firms, and therefore should not have to bear burdens on independent spending solely because of [its] incorporated status." 479 U. S., at 263. In reaching that conclusion, we enumerated three characteristics of the corporation that were "essential" to our holding. *Ibid.* Because the Chamber does not share these crucial features, the Constitution does not require that it be exempted from the generally applicable provisions of § 54(1).

The first characteristic of Massachusetts Citizens for Life, Inc., that distinguished it from ordinary business corporations was that the organization "was formed for the express purpose of promoting political ideas, and cannot engage in business activities." *Id.*, at 264. Its articles of incorporation indicated that its purpose was "[t]o foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political and other forms of activities," *id.*, at 241–242, and all of the organization's activities were "designed to further its agenda," *id.*, at 242. MCFL's narrow political focus thus "ensure[d] that [its] political resources reflect[ed] political support." *Id.*, at 264.

In contrast, the Chamber's bylaws set forth more varied purposes, see *supra*, at 656, several of which are not inherently political. For instance, the Chamber compiles and disseminates information relating to social, civic, and economic conditions, trains and educates its members, and promotes ethical business practices. Unlike MCFL's, the Chamber's educational activities are not expressly tied to political goals; many of its seminars, conventions, and publications are politically neutral and focus on business and economic issues. The Chamber's president and chief executive officer stated that one of the corporation's main purposes is to provide "service to [its] membership that includes everything from group insurance to educational seminars, and . . . litigation activities on behalf of the business community." Deposition of E. James Barrett, Nov. 12, 1985, p. 11. See also PR Newswire, July 21, 1989 (Chamber cosponsored the Automotive Management Briefing Seminar); PR Newswire, May 9, 1989 (Chamber cosponsored the Michigan New Product Awards competition); PR Newswire, June 14, 1988 (Chamber sponsored seminar on product liability losses and lawsuits); PR Newswire, Feb. 4, 1988 (Chamber cosponsored outreach program to increase awareness of investment opportunities in the Caribbean Basin). The Chamber's nonpolitical activities therefore suffice to distinguish it from MCFL in the context of this characteristic.

We described the second feature of MCFL as the absence of "shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity." 479 U. S., at 264. Although the Chamber also lacks shareholders, many of its members may be similarly reluctant to withdraw as members even if they disagree with the Chamber's political expression, because they wish to benefit from the Chamber's nonpolitical programs and to establish contacts with other members of the business community. The Chamber's political agenda is sufficiently distinct from its educational and outreach programs that members who disagree with the former may continue to pay dues to participate in the latter. JUSTICE KENNEDY ignores these disincentives for withdrawing as a member of the Chamber, stating only that "[o]ne need not become a member . . . to earn a living." *Post*, at 710 (KENNEDY, J., dissenting). Certainly, members would be disinclined to terminate their involvement with the organization on the basis of less extreme disincentives than the loss of employment. Thus, we are persuaded that the Chamber's members are more similar to shareholders of a business corporation than to the members of MCFL in this respect.[2]

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[2] A requirement that the Chamber disclose the nature and extent of its political activities, see *post*, at 707 (KENNEDY, J., dissenting), would not eliminate the possible distortion of the political process inherent in independent expenditures from general corporate funds. Given the significant incentive for members to continue their financial support for the Chamber

The final characteristic upon which we relied in *MCFL* was the organization's independence from the influence of business corporations. On this score, the Chamber differs most greatly from the Massachusetts organization. MCFL was not established by, and had a policy of not accepting contributions from, business corporations. Thus it could not "serv[e] as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." 479 U. S., at 264. In striking contrast, more than three-quarters of the Chamber's members are business corporations, whose political contributions and expenditures can constitutionally be regulated by the State. See *Buckley* v. *Valeo*, 424 U. S., at 29 (upholding restrictions on political contributions); *supra*, at 658–661 (regarding independent expenditures). As we read the Act, a corporation's payments into the Chamber's general treasury would not be considered payments to influence an election, so they would not be "contributions" or "expenditures," see §§ 169.204(1), 169.206, and would not be subject to the Act's limitations. Business corporations therefore could circumvent the Act's restriction by funneling money through the Chamber's general treasury.[3] Because the Chamber accepts money from for-profit corporations, it could, absent application of § 54(1), serve as a conduit for corporate political spending. In sum, the Chamber does not possess the fea-

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in spite of their disagreement with its political agenda, disclosure will not ensure that the funds in the Chamber's treasury correspond to members' support for its ideas.

[3] A nonprofit corporation's segregated fund, on the other hand, apparently cannot receive contributions from corporations. See Mich. Comp. Laws § 169.255(3) (1979) (allowing contributions only from "(a) Members of the corporation who are individuals. (b) Stockholders of members of the corporation. (c) Officers or directors of members of the corporation"). In addition, a corporation's payment to a segregated fund would likely be considered a contribution or expenditure because the sole purpose of such segregated funds is to make political contributions and expenditures. § 169.255(1). The segregated fund, therefore, could not be used as a conduit for business corporations' political spending.

tures that would compel the State to exempt it from restriction on independent political expenditures.

IV

The Chamber also attacks § 54(1) as underinclusive because it does not regulate the independent expenditures of unincorporated labor unions.[4] Whereas unincorporated unions, and indeed individuals, may be able to amass large treasuries, they do so without the significant state-conferred advantages of the corporate structure; corporations are "by far the most prominent example of entities that enjoy legal advantages enhancing their ability to accumulate wealth." *MCFL,* 479 U. S., at 258, n. 11. The desire to counterbalance those advantages unique to the corporate form is the State's compelling interest in this case; thus, excluding from the statute's coverage unincorporated entities that also have the capacity to accumulate wealth "does not undermine its justification for regulating corporations." *Ibid.*

Moreover, labor unions differ from corporations in that union members who disagree with a union's political activities need not give up full membership in the organization to avoid supporting its political activities. Although a union and an employer may require that all bargaining unit employees become union members, a union may not compel those employees to support financially "union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Communications Workers* v. *Beck,* 487 U. S. 735, 745 (1988). See also *Abood* v. *Detroit Bd. of Ed.,* 431 U. S. 209 (1977) (holding that compelling nonmember employees to contribute to union's political activities infringes employees' First Amendment rights). An employee who objects to a union's political activities thus can decline to contribute to those activities, while continuing to enjoy the benefits derived from the union's performance of its duties as the exclusive representative of the bargaining unit on labor-management issues. As a result, the funds available for a union's political activities more accurately reflects members' support for the organization's political views than does a corporation's general treasury. Michigan's decision to exclude unincorporated labor unions from the scope of § 54(1) is therefore justified by the crucial differences between unions and corporations.

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[4] The Federal Election Campaign Act restricts the independent expenditures of labor organizations as well as those of corporations. 2 U. S. C. § 441b(a).

V

Because we hold that § 54(1) does not violate the First Amendment, we must address the Chamber's contention that the provision infringes its rights under the Fourteenth Amendment. The Chamber argues that the statute treats similarly situated entities unequally. Specifically, it contends that the State should also restrict the independent expenditures of unincorporated associations with the ability to accumulate large treasuries and of corporations engaged in the media business.

Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be narrowly tailored to serve a compelling governmental interest. *Police Department of Chicago* v. *Mosley*, 408 U. S. 92, 101 (1972). We find that, even under such strict scrutiny, the statute's classifications pass muster under the Equal Protection Clause. As we explained in the context of our discussions of whether the statute was overinclusive, *supra*, at 660–661, or underinclusive, *supra*, at 665 and this page, the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political "war chests" amassed with the aid of the legal advantages given to corporations.

Similarly, we find that the Act's exemption of media corporations from the expenditure restriction does not render the statute unconstitutional. The "media exception" excludes from the definition of "expenditure" any "expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office . . . in the regular course of publication or broadcasting," § 169.206(3)(d).[5] The Court of Appeals did not address the Chamber's equal protection argument because it found that the application of § 54(1) to the Chamber violates the First Amendment. See 856 F. 2d, at 790. The District Court, however, appeared to hold that the media exception does not implicate the Equal Protection Clause because "[a]ny corporation . . . may avail itself of the exemption" by entering the news broadcasting or publishing business. 643 F. Supp., at 405. We are persuaded, however, that a Fourteenth Amendment analysis is necessary in this case. It is true that the exemption does not refer expressly to "media corporations." Nevertheless, the exception will undoubtedly result in the imposition of fewer restrictions on the expression of corporations that are in the media business. Thus, it cannot be regarded as neutral, and the distinction must be justified by a compelling state purpose.

Although all corporations enjoy the same state-conferred benefits inherent in the corporate form, media corporations differ significantly from other corporations in that their resources are devoted to the collection of information and its dissemination to the public. We have consistently recognized the unique role that the press plays in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *Bellotti*, 435 U. S., at 781. See also *Mills* v. *Alabama*, 384 U. S. 214, 219 (1966)

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[5] The Federal Election Campaign Act contains a similar exemption that excludes from the definition of expenditure "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U. S. C. § 431(9)(B)(i).

("[T]he press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve"). The Act's definition of "expenditure," § 169.206, conceivably could be interpreted to encompass election-related news stories and editorials. The Act's restriction on independent expenditures therefore might discourage incorporated news broadcasters or publishers from serving their crucial societal role. The media exception ensures that the Act does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events. Cf. H. R. Rep. No. 93–1239, p. 4 (1974) (explaining a similar federal media exception, 2 U. S. C. § 431(9)(B)(i), as "assur[ing] the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns"); 15 U. S. C. §§ 1801–1804 (enacting a limited exemption from the antitrust laws for newspapers in part because of the recognition of the special role of the press). A valid distinction thus exists between corporations that are part of the media industry and other corporations that are not involved in the regular business of imparting news to the public. Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti*, *supra*, at 782, and n. 18, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations. We therefore hold that the Act does not violate the Equal Protection Clause.

VI

Michigan identified as a serious danger the significant possibility that corporate political expenditures will undermine the integrity of the political process, and it has implemented a narrowly tailored solution to that problem. By requiring corporations to make all independent political expenditures through a separate fund made up of money solicited expressly for political purposes, the Michigan Campaign Finance Act reduces the threat that huge corporate treasuries amassed with the aid of favorable state laws will be used to influence unfairly the outcome of elections. The Michigan Chamber of Commerce does not exhibit the characteristics identified in *MCFL* that would require the State to exempt it from a generally applicable restriction on independent corporate expenditures. We therefore reverse the decision of the Court of Appeals.

It is so ordered.

JUSTICE BRENNAN, concurring.

I join the Court's opinion. As one of the "Orwellian" "censor[s]" derided by the dissents, *post*, at 679 (SCALIA, J.); *post*, at 713 (KENNEDY, J.), and as the author of our recent decision in *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986) *(MCFL)*, I write separately to explain my views in this case.

The Michigan law at issue is not an across-the-board prohibition on political participation by corporations or even a complete ban on corporate political expenditures. Rather, the statute merely requires those corporations wishing to make independent expenditures in support of candidates to do so through segregated funds or political action committees (PAC's) rather than directly from their corporate treasuries.[1] As the dissents observe, this restriction still must be analyzed with great solicitude and care, because independent expenditures constitute expression "'at the core of our electoral process and of the First Amendment freedoms.'" *Buckley* v. *Valeo*, 424 U. S. 1, 39 (1976) *(per curiam)* (quoting *Williams* v. *Rhodes*, 393 U. S. 23, 32 (1968)). I believe, however, that the dissents significantly overstate their case in several important respects and that the Court's decision today is faithful to our prior opinions in the campaign financing area, particularly *MCFL*.

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[1] In *MCFL*, 479 U. S. 238 (1986), we observed that the requirement that expenditures be made through PAC's "is of course distinguishable from the complete foreclosure of any opportunity for political speech that we invalidated in the state referendum context in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978)." *Id.*, at 259, n. 12.

In *MCFL*, we held that a provision of the Federal Election Campaign Act of 1971 (FECA), as added, 90 Stat. 490, and amended, 2 U. S. C. § 441b, similar to the Michigan law at issue here, could not be applied constitutionally to a small, antiabortion advocacy group. In evaluating the First Amendment challenge, however, we "acknowledge[d] the legitimacy of Congress' concern that organizations that amass great wealth in the economic marketplace not gain unfair advantage in the political marketplace." 479 U. S., at 263. Specifically, we noted that "*[d]irect corporate spending* on political activity raises the prospect that resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace," because "[t]he resources in the treasury of a business corporation . . . are not an indication of popular support for the corporation's political ideas." *Id.*, at 257–258 (emphasis added). Instead, these resources reflect "the economically motivated decisions of investors and customers." *Id.*, at 258. A stockholder might oppose the use of corporate funds drawn from the general treasury—which represents, after all, *his* money—in support of a particular political candidate. See *id.*, at 260, citing *FEC* v. *National Right to Work Committee*, 459 U. S. 197, 208 (1982), and *Pipefitters* v. *United States*, 407 U. S. 385, 414–415 (1972). The requirement that corporate independent expenditures be financed through a segregated fund or PAC expressly established to engage in campaign spending is designed to avert this danger. "The resources available to [a PAC], as opposed to the corporate treasury, in fact reflect popular support for the political positions of the committee." *MCFL*, 479 U. S., at 258. We thus adopted the "'underlying theory'" of FECA "'that substantial general purpose treasuries should not be diverted to political purposes'" and that requiring funding by voluntary contributions guarantees that "'the money collected is that intended by those who contribute to be used for political purposes and not money diverted from another source.'" *Ibid.* (quoting 117 Cong. Rec. 43381 (1971) (statement of Rep. Hansen)).[2]

The PAC requirement may be unconstitutional as applied to some corporations because they do not present the dangers at which expenditure limitations are aimed. Indeed, we determined that Massachusetts Citizens for Life—the antiabortion advocacy organization at issue in *MCFL*—fell into this category.[3] We nevertheless predicted that the class of exempt organizations would be small, see 479 U. S., at 264, and we set out three features of MCFL that were "essential" to our holding that it could not be bound by the restriction on independent spending. *Id.*, at 263. First, the group "was formed for the express purpose of promoting political ideas, and [could not] engage in business activities." *Id.*, at 264. Second, it "ha[d] no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensure[d] that persons connected with the organization [had] no economic disincentive for disassociating with it if they disagree[d] with its political activity." *Ibid.* (footnote omitted). Third, the group "was not established by a business corporation or a labor union, and it [was] its policy not to accept contributions from such entities. This prevent[ed it] from serving as [a] condui[t] for the type of direct spending that creates a threat to the political marketplace." *Ibid.*

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[2] We cited with approval in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), a discussion of the constitutionality of restrictions on union contributions and independent expenditures in candidate elections: "[T]he ban on union political contributions and expenditures is not total but applies only to general union funds. Contributions and expenditures made by a separate fund financed by voluntary contributions are specifically permitted, as are expenditures of general funds to solicit contributions to the separate fund. In order to engage in political discussion, a union need only convince its members that its views are sound enough to merit a contribution to a union political committee espousing the same political philosophy. The necessity of convincing union members of the value of such a contribution does not amount to a constitutionally invalid burden. After all, if union members are so unconvinced of the reasonableness of the union's position that they refuse to support it, the argument for prohibiting the union from spending dues money to support its political views is greatly strengthened. . . . In the case of unions, the statute strikes a legitimate and reasonable accommodation by distinguishing between the uses to which a separate, voluntary fund and the general treasury fund may be put." Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L. Rev. 386, 409 (1977) (cited in *Bellotti*, *supra*, at 788, n. 26).

[3] JUSTICE KENNEDY is mistaken when he suggests that by upholding the as-applied challenge in *MCFL* and rejecting it here, we are embarking on "value-laden, content-based speech suppression that permits some nonprofit corporate groups but not others to engage in political speech." *Post*, at 695–696 (KENNEDY, J., dissenting). The mere fact that some as-applied challenges succeed while others fail does not create a system of

The majority today persuasively demonstrates that the situation in this case is markedly different from that in *MCFL*. The Michigan State Chamber of Commerce (Chamber) is first and foremost a business association, not a political advocacy organization. See *ante*, at 661–665. The Michigan statute advances the interest identified in *MCFL* in two distinct ways, by preventing both the Chamber *and other business corporations* from using the funds of other persons for purposes that those persons may not support. First, the state law protects the small businessperson who does not wish his or her dues to be spent in support of political candidates, but who nevertheless wishes to maintain an association with the Chamber because of the myriad benefits it provides that are

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"speech suppression." Whether an organization presents the threat at which the campaign finance laws are aimed has to do with the particular characteristics of the organization at issue and not with the content of its speech. Of course, if a correlation between the two factors could be shown to exist, a group would be free to mount a First Amendment challenge on that basis. Cf. *Buckley* v. *Valeo*, 424 U. S. 1, 97, n. 131 (1976). Neither appellee nor JUSTICE KENNEDY's dissent has provided any reason to believe that such a relationship exists here.

unrelated to its political activities. See *ante*, at 662–663. The bylaws state that the Chamber's "objectives and purposes" shall be in part "[t]o analyze, compile and disseminate information on laws and regulations of interest to the members" and "[t]o further the training and education of the membership by means of educational materials, seminars, conventions, bulletins, newsletters, reports and technical materials." App. 43a. To attract new members, Chamber advertisements promise a wide variety of services, including "regular and special publications, legislative briefings, group insurance, a business hot-line, and seminars." *Id.*, at 42a. Its advertising practices indicate that even the Chamber understands that membership is not a function of support for its political causes alone. A member faces significant disincentives to withdraw, even if he disagrees with the Chamber's expenditures in support of a particular candidate.

In addition, the Michigan law protects dissenting shareholders of business corporations that are members of the Chamber to the extent that such shareholders oppose the use of their money, paid as dues to the Chamber out of general corporate treasury funds, for political campaigns. See *MCFL*, *supra*, at 260–261; cf. *post*, at 686 (SCALIA, J., dissenting). The Michigan law prevents the Chamber from "serv[ing] as a conduit for corporate political spending." *Ante*, at 664. Even JUSTICE KENNEDY, by repeatedly using the qualifier "nonprofit" throughout his opinion, appears to concede that the Michigan law legitimately may be applied to for-profit business corporations, or at least that the Court's rationale might "suffice to justify restricting political speech by for-profit corporations." *Post*, at 703 (dissenting opinion). If that is so, JUSTICE KENNEDY's failure to sustain the statute as applied in this case is perplexing, because the Chamber, unlike other nonprofits such as MCFL, is clearly a conduit for corporations barred from making independent expenditures directly.[4] A corporation cannot under Michigan law make a contribution to a PAC out of its general treasury funds, see *ante*, at 664, n. 3, and we have upheld similar rules restricting the groups from whom PAC's may solicit contributions. See *FEC* v. *National Right to Work Committee*, 459 U. S., at 207–211; *California Medical Assn.* v. *FEC*, 453 U. S. 182, 193–199 (1981) (plurality opinion). It is common ground that a segregated fund, even if it is a "nonprofit corporation," cannot be used as a conduit for independent expenditures by business corporations; I find it unremarkable that the Chamber and other nonprofits cannot perform such a function either.

Of course, a member could resign from the Chamber and a stockholder could divest from a business corporation that used the Chamber as a conduit, but these options would impose a financial sacrifice on those objecting to political expenditures.[5] See *MCFL*, 479 U. S., at 260. It is therefore irrelevant that "[t]o the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own." *Post*, at 710 (KENNEDY, J., dissenting). Moreover, none of the alternatives proposed by JUSTICE KENNEDY would protect a captive stockholder of a business corporation that used the Chamber as a conduit.[6] While the State may have no constitutional *duty* to protect the objecting Chamber member and corporate shareholder in the absence of state action, cf. *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 232–237 (1977), the State surely has a compelling interest in preventing a corporation it has chartered from exploiting those who do not wish to contribute to the Chamber's political message. "A's right to receive information does not require the state to permit B to steal from C the funds that alone will enable B to make the communication." Brudney, Business Corporations and Stockholders' Rights Under the First Amendment, 91 Yale L. J. 235, 247 (1981). Cf. *Communications Workers* v. *Beck*, 487 U. S. 735 (1988); *Machinists* v. *Street*, 367 U. S. 740 (1961). We have long recognized the importance of state corporate law in "protect[ing] the shareholders" of corporations chartered within the State. *CTS Corp.* v. *Dynamics Corp. of America*, 481 U. S. 69, 91 (1987).

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[4] According to JUSTICE KENNEDY's dissent, the majority holds that "it is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union" to make independent expenditures. *Post*, at 698. This characterization is inaccurate. Not only are those groups not part of the proceeding before us, but the dissent has overlooked the central lesson of *MCFL* that the First Amendment may require exemptions, on an as-applied basis, from expenditure restrictions. If a nonprofit corporation is formed with the express purpose of promoting political ideas, is not composed of members who face an economic incentive for disassociating with it, and does not accept contributions from business corporations or labor unions, then it would be governed by our *MCFL* holding.

[5] In addition, shareholders in a large business corporation may find it prohibitively expensive to monitor the activities of the corporation to determine whether it is making expenditures to which they object.

The Michigan law is concededly "underinclusive" insofar as it does not ban other types of political expenditures to which a dissenting Chamber member or corporate shareholder might object. See *post*, at 685–686 (SCALIA, J., dissenting). The particular provision at issue prohibits corporations from using treasury funds only for making independent expenditures in support of, or in opposition to, any candidate in state elections. See *ante*, at 655–656. A corporation remains free, for example, to use general treasury funds to support an initiative proposal in a state referendum.[7] See *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978).

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[6] JUSTICE KENNEDY's argument is also inconsistent with his focus on nonprofit corporations. The leading theory of nonprofit enterprises holds that the rationale for use of the nonprofit form lies chiefly in the so-called "nondistribution constraint"—*i. e.*, the fact that while ordinary business corporations have shareholders who are allowed to receive the residual earnings of the enterprise, the members of a nonprofit corporation are expressly prohibited from receiving any part of the assets or property of the corporation for themselves. See Hansmann, Reforming Nonprofit Corporation Law, 129 U. Pa. L. Rev. 497, 502–507, 557 (1981); Hansmann, The Role of Nonprofit Enterprise, 89 Yale L. J. 835, 843–845 (1980). The nondistribution constraint helps overcome contractual failure in situations where the activities of the corporation are difficult to monitor, by removing the "profit motive" and assuring those who contribute to, and contract with, the corporation that the nonprofit's managers will not exploit informational deficiencies to pursue their own private interests. Hence, JUSTICE KENNEDY's proposed reliance on a nonprofit's donors to monitor and police the corporation's activities overlooks the *raison d'être* of the nonprofit form.

I do not find this underinclusiveness fatal, for several reasons.[8] First, as the dissents recognize, discussions on candidate elections lie "at the heart of political debate." *Post*, at 698 (KENNEDY, J.); see also *post*, at 680, 692 (SCALIA, J.). But just as speech interests are at their zenith in this area, so too are the interests of unwilling Chamber members and corporate shareholders forced to subsidize that speech. The State's decision to focus on this especially sensitive context is a justifiable one.[9] Cf. *MCFL*, 479 U. S., at 258, n. 11. Second, in light of our decisions in *Bellotti, supra, Consolidated Edison Co. of New York* v. *Public Service Comm'n of New York*, 447 U. S. 530, 533–535 (1980), and related cases, a State cannot prohibit corporations from making many other types of political expenditures. One purpose of the underinclusiveness inquiry is to ensure that the proffered state interest actually underlies the law. See, *e. g.*,

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[7] This very "underinclusiveness" belies the dissents' charge that the Michigan law is a broad restriction on corporate political expression; many avenues of communication are open to the Chamber. In addition, the segregated fund requirement in practice has not burdened significantly the Chamber's speech with respect to candidate-oriented expenditures. The Chamber established a PAC in 1977 and has drawn from that fund in every election since then. The Chamber has an eligible class of about 50,000 individuals from whom it can solicit contributions to its PAC under the Michigan statute, and it has been quite successful in doing so. During the 1983–1984 election cycle, the Chamber PAC raised over $102,000, and its projected resources for the 1986 primary and general elections amounted to more than $140,000. See App. in No. 86–1867 (CA6), pp. 164, 184. The District Court found that "the record in this case amply demonstrates that the Chamber PAC frequently makes independent expenditures to influence political elections, and those efforts have been tremendously successful in electing Chamber PAC endorsed candidates." App. to Juris. Statement 66a–67a.

[8] JUSTICE SCALIA also maintains that protection of dissenting shareholders cannot qualify as a valid state interest because shareholders purchase their stock on the understanding that the corporation will use their money for any profitmaking purpose, including support for political candidates with whom the shareholders may not agree. See *post*, at 686–687. We have already rejected this argument in the context of labor unions. See *Abood* v. *Detroit Board of Education*, 431 U. S. 209, 234–235 (1977); *Machinists* v. *Street*, 367 U. S. 740, 764 (1961). Rather than assuming that an employee accepts as "the deal," *post*, at 686, that the union will use his dues for any purpose that will advance the interests of the bargaining unit, including political contributions and expenditures, we have determined that "the authority to impose dues and fees [is] restricted at least to

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the 'extent of denying the unions the right, over the employee's objection, to use his money to support political causes which he opposes,' . . . even though Congress was well aware that *unions had historically expended funds in the support of political candidates and issues*." *Ellis* v. *Railway Clerks*, 466 U. S. 435, 447 (1984) (quoting *Street*, *supra*, at 768) (emphasis added).

Given the extensive state regulation of corporations, shareholder expectations are always a function of *state law*. It is circular to say, as does JUSTICE SCALIA, that *if* a State did not protect shareholders, they would have no expectation of being protected, and therefore that the State has no legitimate interest in protecting them. JUSTICE SCALIA concedes, as he must, that an expenditure "not plausibly tied to [a corporation's] ability to make money for its shareholders" can be prohibited. *Post*, at 691. But States have always been permitted to define what qualifies as "plausibly tied" to the corporation's purpose of making money, *i. e.*, what qualifies as "corporate waste," see *Rogers* v. *Hill*, 289 U. S. 582, 591–592 (1933), including wasteful speech, see *Bellotti*, 435 U. S., at 795; *Cort* v. *Ash*, 422 U. S. 66, 84 (1975). I believe it entirely proper for a State to decide to promote the ability of investors to purchase stock in corporations without fear that their money will be used to support candidates with whom they do not agree.

[9] As JUSTICE STEVENS notes in his concurring opinion today, *post*, at 678–679, n., our decision in *Bellotti* expressly distinguished "state and federal laws regulating corporate participation in partisan *candidate* elections." 435 U. S., at 788, n. 26 (emphasis added).

Florida Star v. *B. J. F.*, 491 U. S. 524, 540 (1989); *FCC* v. *League of Women Voters of California*, 468 U. S. 364, 396 (1984). But to the extent that the Michigan statute is "underinclusive" only because it does not regulate corporate expenditures in referenda or other corporate expression (besides merely commercial speech), this reflects the requirements of our decisions rather than the lack of an important state interest on the part of Michigan in regulating expenditures in *candidate* elections. In this sense, the Michigan law is not "underinclusive" at all. Finally, the provision in Michigan corporate law authorizing shareholder actions against corporate waste might serve as a remedy for other types of political expenditures that have no legitimate connection to the corporation's business. See Mich. Comp. Laws § 600.3605 (1)(b) (1979);[10] cf. *Bellotti, supra*, at 795.

For these reasons, I concur in the Court's opinion.

JUSTICE STEVENS, concurring.

In my opinion the distinction between individual expenditures and individual contributions that the Court identified in *Buckley* v. *Valeo*, 424 U. S. 1, 45–47 (1976), should have little, if any, weight in reviewing corporate participation in candidate elections. In that context, I believe the danger of either the fact, or the appearance, of *quid pro quo* relationships provides an adequate justification for state regulation of both expenditures and contributions. Moreover, as we recognized in *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), there is a vast difference between lobbying and debating public issues on the one hand, and political campaigns for election to public office on the other.* Accordingly, I join the Court's opinion and judgment.

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[10] I express no definitive view of the proper interpretation of this provision of state law inasmuch as it is not part of the case before us.

* "In addition to prohibiting corporate contributions and expenditures for the purpose of influencing the vote on a ballot question submitted to the voters, § 8 also proscribes corporate contributions or expenditures 'for the purpose of aiding, promoting or preventing the nomination or election of

JUSTICE SCALIA, dissenting.

"Attention all citizens. To assure the fairness of elections by preventing disproportionate expression of the views of any single powerful group, your Government has decided that the following associations of persons shall be prohibited from speaking or writing in support of any candidate: ——." In permitting Michigan to make private corporations the first object of this Orwellian announcement, the Court today endorses the principle that too much speech is an evil that the democratic majority can proscribe. I dissent because that

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any person to public office, or aiding, promoting, or antagonizing the interests of any political party.' . . . In this respect, the statute is not unlike many other state and federal laws regulating corporate participation in partisan candidate elections. Appellants do not challenge the constitutionality of laws prohibiting or limiting corporate contributions to political candidates or committees, or other means of influencing candidate elections. Cf. *Pipefitters* v. *United States*, 407 U. S. 385 (1972); *United States* v. *Automobile Workers*, 352 U. S. 567 (1957); *United States* v. *CIO*, 335 U. S. 106 (1948). About half of these laws, including the federal law, 2 U. S. C. § 441b (1976 ed.) (originally enacted as the Federal Corrupt Practices Act, 34 Stat. 864), by their terms do not apply to referendum votes. Several of the others proscribe or limit spending for 'political' purposes, which may or may not cover referenda. See *Schwartz* v. *Romnes*, 495 F. 2d 844 (CA2 1974).

"The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts. See *United States* v. *Automobile Workers*, *supra*, at 570–575; *Schwartz* v. *Romnes*, *supra*, at 849–851. The importance of the governmental interest in preventing this occurrence has never been doubted. The case before us presents no comparable problem, and our consideration of a corporation's right to speak on issues of general public interest implies no comparable right in the quite different context of participation in a political campaign for election to public office. Congress might well be able to demonstrate the existence of a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections. Cf. *Buckley* v. *Valeo*, [424 U. S. 1, 46 (1976)]; Comment, The Regulation of Union Political Activity: Majority and Minority Rights and Remedies, 126 U. Pa. L. Rev. 386, 408–410 (1977)." *First National Bank of Boston* v. *Bellotti*, 435 U. S., at 788, n. 26.

principle is contrary to our case law and incompatible with the absolutely central truth of the First Amendment: that government cannot be trusted to assure, through censorship, the "fairness" of political debate.

I

A

The Court's opinion says that political speech of corporations can be regulated because "[s]tate law grants [them] special advantages," *ante*, at 658, and because this "unique state-conferred corporate structure . . . facilitates the amassing of large treasuries," *ante*, at 660. This analysis seeks to create one good argument by combining two bad ones. Those individuals who form that type of voluntary association known as a corporation are, to be sure, given special advantages—notably, the immunization of their personal fortunes from liability for the actions of the association—that the State is under no obligation to confer. But so are other associations and private individuals given all sorts of special advantages that the State need not confer, ranging from tax breaks to contract awards to public employment to outright cash subsidies. It is rudimentary that the State cannot exact as the price of those special advantages the forfeiture of First Amendment rights. See *Pickering* v. *Board of Education of Township High School Dist. No. 205, Will County*, 391 U. S. 563 (1968); *Speiser* v. *Randall*, 357 U. S. 513 (1958). The categorical suspension of the right of any person, or of any association of persons, to speak out on political matters must be justified by a compelling state need. See *Buckley* v. *Valeo*, 424 U. S. 1, 44–45 (1976) *(per curiam)*. That is why the Court puts forward its second bad argument, the fact that corporations "amas[s] large treasuries." But that alone is also not sufficient justification for the suppression of political speech, unless one thinks it would be lawful to prohibit men and women whose net worth is above a certain figure from endorsing political candidates. Neither of these two flawed arguments is improved by combining them and saying, as the Court in effect does, that "since the State gives special advantages to these voluntary associations, and since they thereby amass vast wealth, they may be required to abandon their right of political speech." *

The Court's extensive reliance upon the fact that the objects of this speech restriction, corporations, receive "special advantages" is in stark contrast to our opinion issued just six years ago in *FCC* v. *League of Women Voters of California*, 468 U. S. 364 (1984). In that decision, striking down a congressionally imposed ban upon editorializing by noncommercial broadcasting stations that receive federal funds, the *only* respect in which we considered the receipt of that "special advantage" relevant was in determining whether the speech limitation could be justified under Congress' spending power, as a means of assuring that the subsidy was devoted only to the purposes Congress intended, which did not include political editorializing. We held it could not be justified on that basis, since "a noncommercial educational station that receives only 1% of its overall income from [federal] grants is barred absolutely from all editorializing. . . . The station has

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*The Court's assertion that the Michigan law "does not impose an *absolute* ban on all forms of corporate political spending," *ante*, at 660, is true only in a respect that is irrelevant for purposes of First Amendment analysis. A corporation is absolutely prohibited from spending its own funds on this form of political speech, and would be guilty of misrepresentation if it asserted that a particular candidate was supported or opposed by the corporation. This is to say that the corporation *as a corporation* is prohibited from speaking. What the Michigan law permits the corporation to do is to serve as the founder and treasurer of a different association of individuals that can endorse or oppose political candidates. The equivalent, where an individual rather than an association is concerned, would be to prohibit John D. Rockefeller from making political endorsements, but to permit him to form an association to which others (though not he himself) can contribute for the purpose of making political endorsements. Just as political speech by that association is not speech by John D. Rockefeller, so also speech by a corporate PAC that the Michigan law allows is not speech by the corporation itself.

no way of limiting the use of its federal funds to all noneditorializing activities, and, more importantly, it is barred from using even wholly private funds to finance its editorial activity." *Id.*, at 400. Of course the same is true here, even assuming that tax exemptions and other benefits accorded to incorporated associations constitute an exercise of the spending power. It is not just that portion of the corporation's assets attributable to the gratuitously conferred "special advantages" that is prohibited from being used for political endorsements, but *all* of the corporation's assets. I am at a loss to explain the vast difference between the treatment of the present case and *League of Women Voters*. Commercial corporations may not have a public *persona* as sympathetic as that of public broadcasters, but they are no less entitled to this Court's concern.

As for the second part of the Court's argumentation, the fact that corporations (or at least some of them) possess "massive wealth": Certain uses of "massive wealth" in the electoral process—whether or not the wealth is the result of "special advantages" conferred by the State—pose a substantial risk of corruption which constitutes a compelling need for the regulation of speech. Such a risk plainly exists when the wealth is given directly to the political candidate, to be used under his direction and control. We held in *Buckley* v. *Valeo*, *supra*, however, that independent expenditures to express the political views of individuals and associations do not raise a sufficient threat of corruption to justify prohibition. *Id.*, at 45. Neither the Court's opinion nor either of the concurrences makes any effort to distinguish that case—except, perhaps, by misdescribing the case as involving "federal laws regulating individual donors," *ante*, at 659, or as involving "individual expenditures," *ante*, at 678 (STEVENS, J., concurring). Section 608(e)(1) of the Federal Election Campaign Act of 1971, 18 U. S. C. § 608(e)(1) (1970 ed., Supp. V), which we found unconstitutional in *Buckley*, was directed, like the Michigan law before us here, to expenditures made for the purpose of advocating the election or defeat of a particular candidate, see 424 U. S., at 42. It limited to $1,000 (a *lesser* restriction than the absolute prohibition at issue here) such expenditures not merely by "individuals," but by "persons," specifically defined to include corporations. See *id.*, at 187 (setting forth § 591(g) of the statute). The plaintiffs in the case included corporations, see *id.*, at 8, and we specifically discussed § 608(e)(1) as a restriction addressed not just to individuals but to "individuals and groups," *id.*, at 39, 48, "persons and groups," *id.*, at 45, "persons and organizations," *ibid.*, "person[s] [and] association[s]," *id.*, at 50. In support of our determination that the restriction was "wholly at odds with the guarantees of the First Amendment" we cited *Miami Herald Publishing Co.* v. *Tornillo*, 418 U. S. 241 (1974), which involved limitations upon a corporation. 424 U. S., at 50. Of course, *if* § 608(e)(1) had been unconstitutional only as applied to individuals and not as applied to corporations, we might nonetheless have invalidated it *in toto* for substantial overbreadth, see *Broadrick* v. *Oklahoma*, 413 U. S. 601, 611–613 (1973), but there is not a hint of that doctrine in our opinion. Our First Amendment law is much less certain than I had thought it to be if we are free to recharacterize each clear holding as a disguised "overbreadth" determination.

Buckley v. *Valeo* should not be overruled, because it is entirely correct. The contention that prohibiting overt advocacy for or against a political candidate satisfies a "compelling need" to avoid "corruption" is easily dismissed. As we said in *Buckley*, "[i]t would naively underestimate the ingenuity and resourcefulness of persons and groups desiring to buy influence to believe that they would have much difficulty devising expenditures that skirted the restriction on express advocacy of election or defeat but nevertheless benefited the candidate's campaign." 424 U. S., at 45. Independent advocacy, moreover, unlike contributions, "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive," thus reducing the danger that it will be exchanged "as a *quid pro quo* for improper commitments from the candidate." *Id.*, at 47. The latter point seems even more plainly true with respect to corporate advocates than it is with respect to individuals. I expect I could count on the fingers of one hand the candidates who would generally welcome, much less negotiate for, a formal endorsement by AT&T or General Motors. The advocacy of such entities that have "amassed great wealth" will be effective only to the extent that it brings to the people's attention *ideas* which—despite the invariably self-interested and probably uncongenial source—strike them as true.

The Court does not try to defend the proposition that independent advocacy poses a substantial risk of political "corruption," as English speakers understand that term. Rather, it asserts that that concept (which it defines as "'financial *quid pro quo*' corruption," *ante*, at 659) is really just a narrow subspecies of a hitherto unrecognized genus of political corruption. "Michigan's regulation," we are told, "aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporations's political ideas." *Ante*, at 659–660. Under this mode of analysis, virtually anything the Court deems politically undesirable can be turned into political corruption—by simply describing its effects as politically "corrosive," which is close enough to "corruptive" to qualify. It is sad to think that the First Amendment will ultimately be brought down not by brute force but by poetic metaphor.

The Court's opinion ultimately rests upon that proposition whose violation constitutes the "New Corruption": Expenditures must "reflect actual public support for the political ideas espoused." *Ante*, at 660. This illiberal free-speech principle of "one man, one minute" was proposed and soundly rejected in *Buckley:*

> "It is argued, however, that the ancillary governmental interest in equalizing the relative ability of indi-

> viduals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates imposed by § 608(e)(1)'s expenditure ceiling. But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,"' and '"to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."'" 424 U. S., at 48–49 (citations omitted).

But it can be said that I have not accurately quoted today's decision. It does not endorse the proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused," but only the more limited proposition that government may ensure that expenditures "reflect actual public support for the political ideas espoused *by corporations.*" *Ante,* at 660 (emphasis added). The limitation is of course entirely irrational. Why is it perfectly all right if advocacy by an individual billionaire is out of proportion with "actual public support" for his positions? There is no explanation, except the effort I described at the outset of this discussion to make one valid proposition out of two invalid ones: When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.

B

JUSTICE BRENNAN's concurrence would have us believe that the prohibition adopted by Michigan and approved by the Court is a paternalistic measure to protect the corporate shareholders of America. It is designed, we are told, "to avert [the] danger" that "corporate funds drawn from the general treasury—which represents, after all, [the shareholder's] money," might be used on behalf of a political candidate he opposes. *Ante*, at 670 (BRENNAN, J., concurring). But such solicitude is a most implausible explanation for the Michigan statute, inasmuch as it permits corporations to take as many ideological and political positions as they please, so long as they are not "in assistance of, or in opposition to, the nomination or election of a candidate." Mich. Comp. Laws § 169.206(1) (1979). That is indeed the Court's sole basis for distinguishing *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765 (1978), which invalidated restriction of a corporation's general political speech. The Michigan law appears to be designed, in other words, neither to protect shareholders, nor even (impermissibly) to "balance" general political debate, but to protect political candidates. Given the degree of political sophistication that ought to attend the exercise of our constitutional responsibilities, it is regrettable that this should come as a surprise.

But even if the object of the prohibition could plausibly be portrayed as the protection of shareholders (which the Court's opinion, at least, does not even assert), that would not suffice as a "compelling need" to support this blatant restriction upon core political speech. A person becomes a member of that form of association known as a for-profit corporation in order to pursue economic objectives, *i. e.*, to make money. Some corporate charters may specify the line of commerce to which the company is limited, but even that can be amended by shareholder vote. Thus, in joining such an association, the shareholder knows that management may take any action that is ultimately in accord with what the majority (or a specified supermajority) of the shareholders wishes, so long as that action is designed to make a profit. That is the deal. The corporate actions to which the shareholder exposes himself, therefore, include many things that he may find politically or ideologically uncongenial: investment in South Africa, operation of an abortion clinic, publication of a pornographic magazine, or even publication of a newspaper that adopts absurd political views and makes catastrophic political endorsements. His only protections against such assaults upon his ideological commitments are (1) his ability to persuade a majority (or the requisite minority) of his fellow shareholders that the action should not be taken, and ultimately (2) his ability to sell his stock. (The latter course, by the way, does not ordinarily involve the severe psychic trauma or economic disaster that JUSTICE BRENNAN's opinion suggests.) It seems to me entirely fanciful, in other words, to suggest that the Michigan statute makes any significant contribution toward insulating the exclusively profit-motivated shareholder from the rude world of politics and ideology.

But even if that were not fanciful, it would be fanciful to think, as JUSTICE BRENNAN's opinion assumes, that there is any difference between for-profit and not-for-profit corporations insofar as the need for protection of the individual member's ideological psyche is concerned. Would it be any more upsetting to a shareholder of General Motors that it endorsed the election of Henry Wallace (to stay comfortably in the past) than it would be to a member of the American Civil Liberties Union that it endorsed the election of George Wallace? I should think much less so. Yet in the one case as in the other, the only protection against association-induced trauma is the will of the majority and, in the last analysis, withdrawal from membership.

C

In Part V of its opinion, the Court accurately sets forth our longstanding First Amendment law as follows:

> "Because the right to engage in political expression is fundamental to our constitutional system, statutory classifications impinging upon that right must be nar-

> rowly tailored to serve a compelling governmental interest." *Ante*, at 666.

The Court finds this requirement fully met for the following reason:

> "As we explained in the context of our discussions of whether the statute was overinclusive, *supra*, at 660–661, or underinclusive, *supra*, at 665 and this page, the State's decision to regulate only corporations is precisely tailored to serve the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Ibid.*

That state interest (assuming it is compelling) does indeed explain why the State chose to silence "only corporations" rather than wealthy individuals as well. But it does not explain (what "narrow tailoring" pertains to) why the State chose to silence *all* corporations, rather than just those that possess great wealth. If narrow tailoring means anything, surely it must mean that action taken to counter the effect of amassed "war chests" must be targeted, if possible, at amassed "war chests." And surely such targeting is possible—either in the manner accomplished by the provision that we invalidated in *Buckley*, *i. e.*, by limiting the prohibition to independent expenditures above a certain amount, or in some other manner, *e. g.*, by limiting the expenditures of only those corporations with more than a certain amount of net worth or annual profit.

No more satisfactory explanation for the obvious lack of "narrow tailoring" is to be found in the Court's discussion of overinclusiveness, to which the above-quoted passage refers. That discussion asserts that we "rejected a similar argument" in *FEC* v. *National Right to Work Comm.*, 459 U. S. 197 (1982) *(NRWC)*, where we said that "'we accept Congress' judgment'" that "'the special characteristics of the corporate structure'" create a "'*potential* for . . . influence that demands regulation.'" *Ante*, at 661, quoting 459 U. S., at 209–210 (emphasis added by the Court). Today's opinion then continues: "Although some closely held corporations, just as some publicly held ones, may not have accumulated significant amounts of wealth, they receive from the State the special benefits conferred by the corporate structure and present the potential for distorting the political process. This potential for distortion justifies § 54(1)'s general applicability to all corporations." *Ante*, at 661.

The Court thus holds, for the first time since Justice Holmes left the bench, that a direct restriction upon speech is narrowly enough tailored if it extends to speech that has the mere *potential* for producing social harm. *NRWC* (which in any event involved not a direct restriction upon corporate speech but a restriction upon corporate solicitation of funds for candidates) is no authority for that startling proposition, since it *did not purport* to be applying the First Amendment narrow-tailoring requirement. The principle the Court abandons today—that the mere potential for harm does not justify a restriction upon speech—had its origin in the "clear and present danger" test devised by Justice Holmes in 1919, see *Schenck* v. *United States*, 249 U. S. 47, 49–51, and championed by him and Justice Brandeis over the next decade in a series of famous opinions opposing the affirmance of convictions for subversive speech, see *Abrams* v. *United States*, 250 U. S. 616, 624 (1919) (Holmes, J., dissenting); *Gitlow* v. *New York*, 268 U. S. 652, 672 (1925) (Holmes, J., dissenting); *Whitney* v. *California*, 274 U. S. 357, 374 (1927) (Brandeis, J., concurring). The Court finally adopted their view in 1937, see *Herndon* v. *Lowry*, 301 U. S. 242, 258; see also *Bridges* v. *California*, 314 U. S. 252, 263 (1941); *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940); *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943); *Terminiello* v. *Chicago*, 337 U. S. 1, 4–5 (1949). Today's reversal of field will require adjustment of a fairly large number of significant First Amendment holdings. Presumably the State may now convict individuals for selling books found to have a potentially harmful influence on minors, *Butler* v. *Michigan*, 352 U. S. 380 (1957), ban indecent telephone communications that have the potential for reaching minors, *Sable Communications of California* v. *FCC*, 492 U. S. 115 (1989), restrain the press from publishing information that has the potential for jeopardizing a criminal defendant's right to a fair trial, *Nebraska Press Assn.* v. *Stuart*, 427 U. S. 539 (1976), or the potential for damaging the reputation of the subject of an investigation, *Landmark Communications, Inc.* v. *Virginia*, 435 U. S. 829 (1978), compel publication of the membership lists of organizations that have a potential for illegal activity, see *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 464 (1958), and compel an applicant for bar membership to reveal her political beliefs and affiliations to eliminate the potential for subversive activity, *Baird* v. *State Bar of Arizona*, 401 U. S. 1 (1971).

It is perplexing, or perhaps revealing, to compare the Court's cavalier treatment of the narrow-tailoring requirement today with its elaborate discussion of that issue six years ago in *League of Women Voters*. See 468 U. S., at 392–395, 397–398. As my earlier discussion makes clear, it would make no difference if the law *were* narrowly tailored to serve its goal, since that goal is not compelling. But the fact that, even having made that first error, the Court must make yet a second in order to reach today's judgment suggests what an impregnable fortress our First Amendment jurisprudence has been. The Court's explicit acceptance of "potential danger" as adequate to establish narrow tailoring, even more than its recognition of an insubstantial interests as "compelling," greatly weakens those defenses.

D

Finally, a few words are in order concerning the Court's approval of the Michigan law's exception for "media corporations." This is all right, we are told, because of "the unique role that the press plays in 'informing and educating the public, offering criticism, and providing a forum for discussion and debate.'" *Ante*, at 667 (citation omitted). But if one believes in the Court's rationale of "compelling state need" to prevent amassed corporate wealth from skewing the political debate, surely that "unique role" of the press does not give Michigan justification for *excluding* media corporations from coverage, but provides especially strong reason to *include* them. Amassed corporate wealth that regularly sits astride the ordinary channels of information is much more likely to produce the New Corruption (too much of one point of view) than amassed corporate wealth that is generally busy making money elsewhere. Such media corporations not only have vastly greater power to perpetrate the evil of overinforming, they also have vastly greater opportunity. General Motors, after all, will risk a stockholder suit if it makes a political endorsement that is not plausibly tied to its ability to make money for its shareholders. But media corporations make money *by* making political commentary, including endorsements. For them, unlike any other corporations, the whole world of politics and ideology is fair game. Yet the Court tells us that it is reasonable to *exclude* media corporations, rather than target them specially.

Members of the institutional press, despite the Court's approval of their illogical exemption from the Michigan law, will find little reason for comfort in today's decision. The theory of New Corruption it espouses is a dagger at their throats. The Court today holds merely that media corporations *may* be excluded from the Michigan law, not that they *must* be. We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers. See *Bellotti*, 435 U. S., at 782, and cases cited. Thus, the Court's holding on this point must be put in the following unencouraging form: "Although the press' unique societal role may not entitle the press to greater protection under the Constitution, *Bellotti*, *supra*, at 782, and

n. 18, it does provide a compelling reason for the State to exempt media corporations from the scope of political expenditure limitations." *Ante,* at 668. One must hope, I suppose, that Michigan will continue to provide this generous and voluntary exemption.

II

I would not do justice to the significance of today's decision to discuss only its lapses from case precedent and logic. Infinitely more important than that is its departure from long-accepted premises of our political system regarding the benevolence that can be expected of government in managing the arena of public debate, and the danger that is to be anticipated from powerful private institutions that compete with government, and with one another, within that arena.

Perhaps the Michigan law before us here has an unqualifiedly noble objective—to "equalize" the political debate by preventing disproportionate expression of corporations' points of view. But governmental abridgment of liberty is always undertaken with the very best of announced objectives (dictators promise to bring order, not tyranny), and often with the very best of genuinely intended objectives (zealous policemen conduct unlawful searches in order to put dangerous felons behind bars). The premise of our Bill of Rights, however, is that there are some things—even some seemingly *desirable* things—that government cannot be trusted to do. The very first of these is establishing the restrictions upon speech that will assure "fair" political debate. The incumbent politician who says he welcomes full and fair debate is no more to be believed than the entrenched monopolist who says he welcomes full and fair competition. Perhaps the Michigan Legislature was genuinely trying to assure a "balanced" presentation of political views; on the other hand, perhaps it was trying to give unincorporated unions (a not insubstantial force in Michigan) political advantage over major employers. Or perhaps it was trying to assure a "balanced" presentation because it knows that with evenly balanced speech incumbent officeholders generally win. The fundamental approach of the First Amendment, I had always thought, was to assume the worst, and to rule the regulation of political speech "for fairness' sake" simply out of bounds. I doubt that those who framed and adopted the First Amendment would agree that avoiding the New Corruption, that is, calibrating political speech to the degree of public opinion that supports it, is even a *desirable* objective, much less one that is important enough to qualify as a compelling state interest. Those Founders designed, of course, a system in which popular ideas would ultimately prevail; but also, through the First Amendment, a system in which true ideas could readily become popular. For the latter purpose, the calibration that the Court today endorses is precisely backwards: To the extent a valid proposition has scant public support, it should have wider rather than narrower public circulation. I am confident, in other words, that Jefferson and Madison would not have sat at these controls; but if they did, they would have turned them in the opposite direction.

Ah, but then there is the special element of corporate wealth: What would the Founders have thought of that? They would have endorsed, I think, what Tocqueville wrote in 1835:

> "When the members of an aristocratic community adopt a new opinion or conceive a new sentiment, they give it a station, as it were, beside themselves, upon the lofty platform where they stand; and opinions or sentiments so conspicuous to the eyes of the multitude are easily introduced into the minds or hearts of all around. In democratic countries the governing power alone is naturally in a condition to act in this manner; but it is easy to see that its action is always inadequate, and often dangerous. . . . No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercises, even unintentionally, an insupportable tyranny . . . . Worse still will be the case if the

> government really believes itself interested in preventing all circulation of ideas; it will then stand motionless and oppressed by the heaviness of voluntary torpor. Governments, therefore, should not be the only active powers; associations ought, in democratic nations, to stand in lieu of those powerful private individuals whom the equality of conditions has swept away." 2 A. de Tocqueville, Democracy in America 109 (P. Bradley ed. 1948).

While Tocqueville was discussing "circulation of ideas" in general, what he wrote is also true of candidate endorsements in particular. To eliminate voluntary associations—not only including powerful ones, but *especially* including powerful ones—from the public debate is either to augment the always dominant power of government or to impoverish the public debate. The case at hand is a good enough example. Why should the Michigan voters in the 93d House District be deprived of the information that private associations owning and operating a vast percentage of the industry of the State, and employing a large number of its citizens, believe that the election of a particular candidate is important to their prosperity? Contrary to the Court's suggestion, the same point cannot effectively be made through corporate PACs to which individuals may voluntarily contribute. It is important to the message that it represents the views of Michigan's leading corporations *as corporations*, occupying the "lofty platform" that they do within the economic life of the State—not just the views of some *other* voluntary associations to which some of the corporations' shareholders belong.

Despite all the talk about "corruption and the appearance of corruption"—evils that are not significantly implicated and that can be avoided in many other ways—it is entirely obvious that the object of the law we have approved today is not to prevent wrongdoing but to prevent speech. Since those private associations known as corporations have so much money, they will speak so much more, and their views will be given inordinate prominence in election campaigns. This is not an argument that our democratic traditions allow—neither with respect to individuals associated in corporations nor with respect to other categories of individuals whose speech may be "unduly" extensive (because they are rich) or "unduly" persuasive (because they are movie stars) or "unduly" respected (because they are clergymen). The premise of our system is that there is no such thing as too much speech—that the people are not foolish but intelligent, and will separate the wheat from the chaff. As conceded in Lincoln's aphorism about fooling "all of the people some of the time," that premise will not invariably accord with reality; but it will assuredly do so much more frequently than the premise the Court today embraces: that a healthy democratic system can survive the legislative power to prescribe how much political speech is too much, who may speak, and who may not.

* * *

Because today's decision is inconsistent with unrepudiated legal judgments of our Court, but even more because it is incompatible with the unrepealable political wisdom of our First Amendment, I dissent.

JUSTICE KENNEDY, with whom JUSTICE O'CONNOR and JUSTICE SCALIA join, dissenting.

The majority opinion validates not one censorship of speech but two. One is Michigan's content-based law which decrees it a crime for a nonprofit corporate speaker to endorse or oppose candidates for Michigan public office. By permitting the statute to stand, the Court upholds a direct restriction on the independent expenditure of funds for political speech for the first time in its history.

The other censorship scheme, I most regret to say, is of our own creation. It is value-laden, content-based speech suppression that permits some nonprofit corporate groups, but not others, to engage in political speech. After failing to disguise its animosity and distrust for the particular kind of political speech here at issue—the qualifications of a candidate to understand economic matters—the Court adopts a rule that allows Michigan to stifle the voices of some of the most respected groups in public life on subjects central to the integrity of our democratic system. Each of these schemes is repugnant to the First Amendment and contradicts its central guarantee, the freedom to speak in the electoral process. I dissent.

I

To understand the force of the Michigan statutory censorship scheme, one need not go beyond the facts of the case before us. The Michigan State Chamber of Commerce (Chamber) is a nonprofit corporation with an interest in candidates and public policy issues throughout the State of Michigan. The Chamber sought, on its own initiative and without communication with the candidate, to place a newspaper advertisement in support of one Richard Bandstra, a candidate for the House of Representatives in Michigan. (The proposed advertisement is reproduced in the Appendix to this opinion.) The advertisement discussed the local economy and unemployment and explained why the candidate supported by the Chamber would understand and improve local economic conditions. This communication is banned by the law here in question, the Michigan Campaign Finance Act (Act), 1976 Mich. Pub. Acts 388, Mich. Comp. Laws § 169.201 *et seq.* (1979).

The Act prohibits "a corporation," including a nonprofit corporation, from making any "expenditure" in connection with an election campaign for state office.[1] An expenditure

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[1] Section 54 of the Act states:

"Sec. 54. (1) Except with respect to the exceptions and conditions in subsections (2) and (3) and section 55, and to loans made in the ordinary course of business, a corporation may not make a contribution or expendiincludes any payment or other contribution in "assistance of, or in opposition to, the nomination or election of a candidate . . . ."[2] The Act by its terms forbids corporations to make "independent expenditures" undertaken without any coordination or even communication with a candidate's organization.[3] Under the Act, a corporate expenditure made for

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ture or provide volunteer personal services which services are excluded from the definition of a contribution pursuant to section 4(3)(a).

. . . . .

"(4) Nothing in this section shall preclude a corporation or joint stock company from making an independent expenditure in any amount for the qualification, passage, or defeat of a ballot question. A corporation making an independent expenditure under this subsection shall be considered a ballot question committee for the purposes of this act." Mich. Comp. Laws § 169.254 (1979).

[2] Section 6 provides:

"Sec. 6. (1) 'Expenditure' means a payment, donation, loan, pledge, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualifaction, passage, or defeat of a ballot question. . . .

"(2) Expenditure includes a contribution or a transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of any candidate or the qualification, passage, or defeat of a ballot question.

"(3) Expenditure does not include:

. . . . .

"(c) An expenditure for communication on a subject or issue if the communication does not support or oppose a ballot issue or candidate by name or clear inference or an expenditure for the establishment, administration, or solicitation of contributions to a fund or independent committee.

"(d) An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for any news story, commentary, or editorial in support of or opposition to a candidate for elective office, or a ballot question in the regular course of publication or broadcasting." Mich. Comp. Laws § 169.206 (1979).

[3] Section 9(1) states:

"Sec. 9. (1) 'Independent expenditure' means an expenditure as defined in section 6 by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee." Mich. Comp. Laws § 169.209(1) (1979).

purposes of communicating on issues of public policy is permissible only if it does not support or oppose a candidate by name or by "inference."[4] Violation of the Act is a felony.[5]

A

The State has conceded that among those communications prohibited by its statute are the publication by a nonprofit corporation of its own assessment of a candidate's voting record. With the *imprimatur* of this Court, it is now a felony in Michigan for the Sierra Club, or the American Civil Liberties Union, or the Michigan Chamber of Commerce, to advise the public how a candidate voted on issues of urgent concern to its members. In both practice and theory, the prohibition aims at the heart of political debate.

As the majority must acknowledge, and as no party contests, the advertisement in this case is a paradigm of political speech. *Buckley* v. *Valeo*, 424 U. S. 1, 14–15 (1976). The Michigan statute bans it, however, along with all other communications by nonprofit corporate speakers that carry an inference of support for, or opposition to, a candidate, on the sole ground that the speaker is organized in corporate form. The Act operates to prohibit information essential to the ability of voters to evaluate candidates. In my view, this speech cannot be restricted.

Far more than the interest of the Chamber is at stake. We confront here society's interest in free and informed discussion on political issues, a discourse vital to the capacity for self-government. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *First National Bank of Boston* v. *Bellotti*, 435 U. S. 765, 784–785 (1978). There is little doubt that by silencing advocacy groups that operate in the corporate form and forbidding them to speak on electoral politics, Michigan's law suffers from both of these constitutional defects.

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[4] See n. 2, *supra*.

[5] Section 54(5) states:

"(5) A person who knowingly violates this section is guilty of a felony and shall be punished by a fine of not more than $5,000.00 or imprisoned for not more than 3 years, or both, and if the person is other than an individual, the person shall be fined not more than $10,000.00." Mich. Comp. Laws § 169.254(5) (1979).

First, the Act prohibits corporations from speaking on a particular subject, the subject of candidate elections. It is a basic precept that the State may not confine speech to certain subjects. Content-based restrictions are the essence of censorial power. *Ibid.* (invalidating statute that allowed corporations to speak on referenda issues that materially affected their business, but not on other subjects). See also *Consolidated Edison Co. of New York* v. *Public Service Comm'n of New York*, 447 U. S. 530, 537 (1980) ("The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic").

Second, the Act discriminates on the basis of the speaker's identity. Under the Michigan law, any person or group other than a corporation may engage in political debate over candidate elections; but corporations, even nonprofit corporations that have unique views of vital importance to the electorate, must remain mute. Our precedents condemn this censorship. See *Bellotti*, *supra*, at 784–786; *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972) (invalidating state statute that prohibited picketing near certain buildings but allowed certain labor picketers); *Carey* v. *Brown*, 447 U. S. 455 (1980).

The protection afforded core political speech is not diminished because the speaker is a nonprofit corporation. Even in the case of a for-profit corporation, we have upheld the right to speak on ballot issues. The *Bellotti* Court stated:

> "If the speakers here were not corporations, no one would suggest that the State could silence their proposed speech. It is the type of speech indispensable to deci-

> sionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual. The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual." 435 U. S., at 777 (footnotes omitted).

By using distinctions based upon both the speech and the speaker, the Act engages in the rawest form of censorship: the State censors what a particular segment of the political community might say with regard to candidates who stand for election. The Court's holding cannot be reconciled with the principle that "'legislative restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment.'" *Meyer* v. *Grant*, 486 U. S. 414, 428 (1988), quoting *Buckley* v. *Valeo*, *supra*, at 50.

B

The second censorship scheme validated by today's holding is the one imposed by the Court. In *FEC* v. *Massachusetts Citizens for Life, Inc.*, 479 U. S. 238 (1986) *(MCFL)*, a First Amendment right to use corporate treasury funds was recognized for the nonprofit corporation then before us. Those who thought that the First Amendment exists to protect all points of view in candidate elections will be disillusioned by the Court's opinion today; for that protection is given only to a preferred class of nonprofit corporate speakers: small, single issue nonprofit corporations that pass the Court's own vague test for determining who are the favored participants in the electoral process. There can be no doubt that if a State were to enact a statute empowering an administrative board to determine which corporations could place candidate advertisements in newspapers and which could not, with authority to enforce the guidelines the Court adopts today to distinguish between the Massachusetts Citizens for Life and the Michigan Chamber of Commerce, the statute would be held unconstitutional. The First Amendment does not permit courts to exercise speech suppression authority denied to legislatures.

The Court draws support for its discrimination among nonprofit corporate speakers from portions of our opinion in *MCFL, supra.* It must be acknowledged that certain language in *MCFL,* in particular the discussion which pointed to the express purpose of the organization to promote political ideas, *id.* at 263–265, lends support to the majority's test. That language, however, contravenes fundamental principles of neutrality for all political speech. It should not stand in the way of giving full force to the essential and vital holding of *MCFL,* which is that a nonprofit corporation engaged in political discussion of candidates and elections has the full protection of the First Amendment.

II

The Act does not meet our standards for laws that burden fundamental rights. The State cannot demonstrate that a compelling interest supports its speech restriction, nor can it show that its law is narrowly tailored to the purported statutory end. See *Bellotti, supra,* at 786, 793–795. Restrictions on independent expenditures are unconstitutional if they fail to meet both of these standards. *Buckley* v. *Valeo,* 424 U. S. 1 (1976); *First National Bank of Boston* v. *Bellotti, supra; FEC* v. *National Conservative Political Action Committee,* 470 U. S. 480 (1985) *(NCPAC); MCFL, supra.* The majority opinion cannot establish either of these predicate conditions for the speech restriction imposed by the State.[6]

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[6] As the primary objective of the statute is itself prohibited by the First Amendment, there is no need to explain that the statute is invalid also because it is vague and imprecise. It should be noted, however, that the criminal prohibition of speech which by "inference" can be taken to support a candidate, see Mich. Comp. Laws § 169.206(3)(c) (1979), must in itself chill speech on public issues, which the Court has already found protected in *Bellotti.*

A

Our cases acknowledge the danger that corruption poses for the electoral process, but draw a line in permissible regulation between payments to candidates ("contributions") and payments or expenditures to express one's own views ("independent expenditures"). Today's decision abandons this distinction and threatens once-protected political speech. The Michigan statute prohibits independent expenditures by a nonprofit corporate speaker to express its own views about candidate qualifications. Independent expenditures are entitled to greater protection than campaign contributions. *MCFL, supra,* at 259–260. See also *Buckley,* 424 U. S., at 20–21. "[E]xpenditure ceilings impose significantly more severe restrictions on protected freedoms of political expression and association than do . . . limitations on financial contributions." *Id.,* at 23. Candidate campaign contributions are subject to greater regulation because of the enhanced risk of corruption from the possibility that a large contribution would be given to secure political favors; independent expenditures pose no such risk:

> "Unlike contributions, such independent expenditures may well provide little assistance to the candidate's campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate." *Id.,* at 47.

Appellants' reliance on cases involving contributions, such as *FEC* v. *National Right to Work Committee,* 459 U. S. 197 (1982), is misplaced.

The proper analysis must follow our cases on independent expenditures. We have established that limitations on independent political expenditures are subject to exacting First Amendment scrutiny. In *Buckley*, we invalidated a federal limitation on independent expenditures because they had no tendency to corrupt. By like analysis, we invalidated a ban on independent corporate expenditures for referenda issues, *First National Bank of Boston* v. *Bellotti*, *supra*, and a federal limitation which prohibited political committees from spending more than $1,000 in support of any candidate who had accepted public funding, *NCPAC*, 470 U. S., at 491. In *NCPAC*, we found that the mere hypothetical possibility that candidates may take notice of and reward political action committee (PAC) expenditures by giving official favors was insufficient to demonstrate that the threat of corruption justified the spending regulation. *Id.*, at 497.

The majority almost admits that, in the case of independent expenditures, the danger of a political *quid pro quo* is insufficient to justify a restriction of this kind. Since the specter of corruption, which had been "the only legitimate and compelling government interes[t] thus far identified for restricting campaign finances," *NCPAC*, *supra*, at 496–497, is missing in this case, the majority invents a new interest: combating the "corrosive and distorting effects of immense aggregations of wealth," *ante*, at 660, accumulated in corporate form without shareholder or public support. The majority styles this novel interest as simply a different kind of corruption, but has no support for its assertion. While it is questionable whether such imprecision would suffice to justify restricting political speech by for-profit corporations, it is certain that it does not apply to nonprofit entities.

The evil of political corruption has been defined in more precise terms. We have said: "Corruption is a subversion of the political process" whereby "[e]lected officials are influenced to act contrary to their obligations of office by the prospect of financial gain . . . ." *NCPAC*, *supra*, at 497. In contrast, the interest touted by the majority is the impermissible one of altering political debate by muting the impact of certain speakers.

The regulatory mechanism adopted by the Michigan statute is aimed at reducing the quantity of political speech, a rationale endorsed by today's majority. The First Amendment rests on quite the opposite theory. As we have already said in the context of political expenditures:

> "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U. S., at 19 (footnote omitted); see also *id.*, at 39.

In *Buckley* and *Bellotti*, acting on these precepts, we rejected the argument that the expenditure of money to increase the quantity of political speech somehow fosters corruption. The key to the majority's reasoning appears to be that because some corporate speakers are well supported and can buy press space or broadcast time to express their ideas, government may ban all corporate speech to ensure that it will not dominate political debate. The argument is flawed in at least two respects. First, the statute is overinclusive because it covers all groups which use the corporate form, including all nonprofit corporations. Second, it assumes that the government has a legitimate interest in equalizing the relative influence of speakers.

With regard to nonprofit corporations in particular, there is no reason to assume that the corporate form has an intrinsic flaw that makes it corrupt, or that all corporations possess great wealth, or that all corporations can buy more media coverage for their views than can individuals or other groups. There is no reason to conclude that independent speech by a corporation is any more likely to dominate the political arena than speech by the wealthy individual, protected in *Buckley* v. *Valeo*, *supra*, or by the well-funded PAC, protected in *NCPAC*, *supra* (protecting speech rights of PAC's against expenditure limitations). In *NCPAC*, we discredited the argument that because PAC's spend larger amounts than individuals, the potential for corruption is greater. *Id.*, at 497–498. We distinguished between the campaign contribution at issue in *FEC* v. *National Right to Work Committee*, *supra*, and independent expenditures, by noting that while "the compelling governmental interest in preventing corruption supported the restriction of the influence of political war chests funneled through the corporate form" with regard to candidate campaign contributions, a similar finding could not be supported for independent expenditures. *NCPAC*, *supra*, at 500–501.

In addition, the notion that the government has a legitimate interest in restricting the quantity of speech to equalize the relative influence of speakers on elections is antithetical to the First Amendment:

> "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed 'to secure "the widest possible dissemination of information from diverse and antagonistic sources,"' . . . . The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion." *Buckley*, *supra*, at 48–49 (citations omitted).

That those who can afford to publicize their views may succeed in the political arena as a result does not detract from the fact that they are exercising a First Amendment right. *Meyer* v. *Grant*, 486 U. S., at 426, n. 7 (upholding First Amendment right to use paid petition circulators). As we stated in *Bellotti*, paid advocacy "may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it." 435 U. S., at 790. The suggestion that the government has an interest in shaping the political debate by insulating the electorate from too much exposure to certain views is incompatible with the First Amendment. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.*, at 791; see also *Meyer*, *supra*, at 426, n. 7; *Brown* v. *Hartlage*, 456 U. S. 45, 60 (1982).

An argument similar to that made by the majority was rejected in *Bellotti*. There, we rejected the assumption that "corporations are wealthy and powerful and their views may drown out other points of view" or "exert an undue influence" on the electorate in the absence of a showing that the relative voice of corporations was significant. 435 U. S., at 789. And even were we to assume that some record support for this assertion would make a constitutional difference, it has not been established here. The majority provides only conjecture. All censorship is suspect; but censorship based on vague surmise is not permissible in any case.

The Act, as the State itself says, prevents a nonprofit corporate speaker from using its own funds to inform the voting public that a particular candidate has a good or bad voting record on issues of interest to the association's adherents. Though our era may not be alone in deploring the lack of mechanisms for holding candidates accountable for the votes they cast, that lack of accountability is one of the major concerns of our time. The speech suppressed in this case was directed to political qualifications. The fact that it was spoken by the Michigan Chamber of Commerce, and not a man or woman standing on a soapbox, detracts not a scintilla from its validity, its persuasiveness, or its contribution to the political dialogue.

The Court purports to distinguish *MCFL* on the ground that the nonprofit corporation permitted to speak in that case received no funds from profit-making corporations. It is undisputed that the Michigan Chamber of Commerce is itself a nonprofit corporation. The crucial difference, it is said, is that the Chamber receives corporate contributions. But this distinction rests on the fallacy that the source of the speaker's funds is somehow relevant to the speaker's right of expression or society's interest in hearing what the speaker has to say. There is no reason that the free speech rights of an individual or of an association of individuals should turn on the circumstance that funds used to engage in the speech come from a corporation. Many persons can trace their funds to corporations, if not in the form of donations, then in the form of dividends, interest, or salary. That does not provide a basis to deprive such individuals or associations of their First Amendment freedoms. The more narrow alternative of recordkeeping and funding disclosure is available. See *MCFL*, 479 U. S., at 262. A wooden rule prohibiting independent expenditures by nonprofit corporations that receive funds from business corporations invites discriminatory distinctions. The principled approach is to acknowledge that where political speech is concerned, freedom to speak extends to all nonprofit corporations, not the special favorites of a majority of this Court.

B

The majority concludes that the Michigan Act is narrowly tailored. First, it seeks support in the availability of PAC's as an alternative to direct speech. Second, the majority advances the rationale that the restriction protects shareholders from the use of corporate funds to support speech with which they may not agree. Third, it asserts that independent expenditures funded by corporate wealth pose inherent dangers. None of these justifications can suffice to save the Act.

That the censorship applies to the nonprofit corporate speaker itself and not to a PAC that it has organized, far from being a saving feature of the regulation, further condemns it. The argument that the availability of a PAC as an alternative means, see Mich. Comp. Laws § 169.255 (1979), can save a restriction on independent corporate expenditures was rejected by the Court in *MCFL*, 479 U. S., at 253–255; *id.*, at 266 (O'CONNOR, J., concurring), as a costly and burdensome disincentive to speech. The record in this case tended to show that between 25 and 50 percent of a PAC's funds are required to establish and administer the PAC. See App. 103a, 108a. While the corporation can direct the PAC to make expenditures on behalf of candidates, the PAC can be funded only by contributions from shareholders, directors, officers, and managerial employees, and cannot receive corporate treasury funds. Mich. Comp. Laws § 169.255(3) (1979). That the avenue left open is more burdensome than the one foreclosed is "sufficient to characterize [a statute] as an infringement on First Amendment activities." 479 U. S., at 255. *Consolidated Edison Co.*, 447 U. S., at 541, n. 10; see also *Virginia Pharmacy Bd.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 757, n. 15 (1976). As the Court reaffirmed just two Terms ago, "[t]he First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer* v. *Grant*, 486 U. S., at 424.

The secondhand endorsement structure required by the Michigan state law debases the value of the voice of nonprofit corporate speakers. The public is not interested in what a PAC says; it does care what the group itself says, so that the group itself can be given credit or blame for the candidates it has endorsed or opposed. PAC's suffer from a poor public image. See App. 92a, 104a, 108a. An advertisement for which a nonprofit group takes direct responsibility, in all likelihood, will have more credibility and generate less distrust than one funded by a PAC. PAC's are interim, ad hoc organizations with little continuity or responsibility. The respected organizations affected by this case have a continuity, a stability, and an influence that makes it critical for their members and the public at large to evaluate their official policies to determine whether the organizations have earned credibility over a period of time. If a particular organization supports a candidate who injures its cause or offends its ideals, the organization itself, not some intermediary committee, ought to take the blame. It is a sad irony that the group before us wishes to assume that responsibility but the action of the State, endorsed by this Court, does not allow it to do so.

The diffusion of the corporate message produced by the PAC requirement also ensures a lack of fit between the statute's ends and its means. If the concern is that nonprofit corporate speech distorts the political process, it would seem that injecting the confusion of a PAC as an intermediary, albeit one controlled and directed by the corporation, further diffuses responsibility. Even if there were any possibility of corruption by allowing the Michigan Chamber of Commerce to finance the proposed advertisement supporting a candidate, it makes no sense to argue that such a possibility would be eliminated by requiring the disclaimer at the bottom to read "Paid for by the Michigan Chamber of Commerce PAC" rather than "Paid for by the Michigan Chamber of Commerce."

The majority relies on the state interest in protecting members from the use of nonprofit corporate funds to support candidates whom they may oppose. We should reject this interest as insufficient to save the Act here, just as we rejected the argument in *Bellotti,* 435 U. S., at 792–793. See also *Consolidated Edison Co., supra,* at 543.

The Court takes refuge in the argument that some members or contributors to nonprofit corporations may find their own views distorted by the organization, and cites our holding in *Abood* v. *Detroit Board of Education,* 431 U. S. 209 (1977). *Abood* does not apply here, as the disincentives to dissociate are not comparable. *Bellotti, supra,* at 794, n. 34 (noting "crucial distinction" between union members and shareholders). One need not become a member of the Michigan Chamber of Commerce or the Sierra Club in order to earn a living. To the extent that members disagree with a nonprofit corporation's policies, they can seek change from within, withhold financial support, cease to associate with the group, or form a rival group of their own. Allowing government to use the excuse of protecting shareholder rights to stifle the speech of private, voluntary organizations undermines the First Amendment.

To create second-class speakers that can be stifled on the subject of candidate qualifications is to silence some of the most significant participants in the American public dialogue, as evidenced by the *amici* briefs filed on behalf of the Chamber of Commerce by the American Civil Liberties Union, the Center for Public Interest Law, the American Medical Association, the National Association of Realtors, the American Insurance Association, the National Organization for Women, Greenpeace Action, the National Abortion Rights Action League, the National Right to Work Committee, the Planned Parenthood Federation of America, the Fund for the Feminist Majority, the Washington Legal Foundation, and the Allied Educational Foundation. I reject any argument based on the idea that these groups and their views are not of importance and value to the self-fulfillment and self-expression of their members, and to the rich public dialogue that must be the mark of any free society. To suggest otherwise is contrary to the American political experience and our own judicial knowledge.

It is a distinctive part of the American character for individuals to join associations to enrich the public dialogue. See, *e. g.*, R. Horn, Groups and the Constitution 13–18 (1956). The theme of group identity is part of the history of American democracy. See, *e. g.*, The Federalist No. 10 (J. Madison). As Toqueville observed:

> "Americans of all ages, all conditions, and all dispositions constantly form associations. They have not only com-

> mercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, religious, moral, serious, futile, general or restricted, enormous or diminutive. . . . If it is proposed to inculcate some truth or to foster some feeling by the encouragement of a great example, they form a society. Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association." 2 A. de Toqueville, Democracy in America 106 (P. Bradley ed. 1948).

Finally, the majority's conclusion that the statute is not overinclusive because independent expenditures by nonprofit corporations may be assumed to have a pernicious, distorting effect on political processes does not withstand the rigorous scrutiny applicable to bans on speech. See *NCPAC*, 470 U. S., at 501. It even contradicts *MCFL*, where we said: "[A]ssociations do not suddenly present the specter of corruption merely by assuming the corporate form." 479 U. S., at 263. The Court reasons that the Chamber of Commerce benefits from a "unique state-conferred corporate structure that facilitates the amassing of large treasuries." *Ante*, at 660. This proposition is not self-evident and has little or no relation to the suppression of ideas. The reality, of course, is that some groups and organizations, particularly those with many members, may find that the nonprofit corporate form is the only feasible way of organizing so that they can transmit important views to the public as a whole. Because the unincorporated association structure carries with it a high risk of personal liability for members and operates in an uncertain legal climate, groups often prefer to organize in nonprofit corporate form. The corporate form provides clear rights and responsibilities and limits the liability of members. E. Hadden & B. French, Nonprofit Organizations 12 (1987); H. Oleck, Nonprofit Corporations, Organizations and Associations 30–31 (4th ed. 1982); M. Lane, Legal

Handbook for Nonprofit Organizations 4, 22–26, 43, 59–61, 124 (1980). For these reasons, in recent years the number of important unincorporated associations has dwindled while the number of incorporated associations has proliferated. Oleck, *supra*, at 31. By deciding to operate as a nonprofit corporation rather than an unincorporated association, a group does not forfeit its First Amendment protection to participate in political discourse.

III

An independent ground for invalidating this statute is the blanket exemption for media corporations. It is beyond peradventure that the media could not be prohibited from speaking about candidate qualifications. The First Amendment would not tolerate a law prohibiting a newspaper or television network from spending on political comment because it operates through a corporation. See *Mills* v. *Alabama*, 384 U. S. 214, 218–220 (1966). As JUSTICE BRENNAN, supported by a majority of the Court in *Dun & Bradstreet, Inc.* v. *Greenmoss Builders, Inc.*, 472 U. S. 749 (1985), stated: "[T]he rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Id.*, at 784 (dissenting opinion, joined by MARSHALL, BLACKMUN, and STEVENS, JJ.); *id.*, at 773 (WHITE, J., concurring in judgment) ("[T]he First Amendment gives no more protection to the press . . . than it does to others exercising their freedom of speech"). The argument relied on by the majority, that media corporations are in the business of communicating and other corporations are not, is unsatisfying. All corporations communicate with the public to some degree, whether it is their business or not; and communication is of particular importance for nonprofit corporations.

The web of corporate ownership that links media and nonmedia corporations is difficult to untangle for the purpose of any meaningful distinction. Newspapers, television networks, and other media may be owned by parent corporations with multiple business interests. Nothing in the statutory scheme prohibits a business corporate parent from directing its newspaper to support or oppose a particular candidate. The Act not only permits that discretion or control, but makes it a crime for a public-interest nonprofit corporation to bring to light such activity if to do so infers candidate support or opposition. I can find no permissible basis under the First Amendment for the States to make this unsupported distinction among corporate speakers.

IV

The Court's hostility to the corporate form used by the speaker in this case and its assertion that corporate wealth is the evil to be regulated is far too imprecise to justify the most severe restriction on political speech ever sanctioned by this Court. In any event, this distinction is irrelevant to a nonprofit corporation. "Where at all possible, government must curtail speech only to the degree necessary to meet the particular problem at hand, and must avoid infringing on speech that does not pose the danger that has prompted regulation." *MCFL,* 479 U. S., at 265. The wholesale ban on corporate political speech enacted by the Michigan Legislature is "too blunt an instrument for such a delicate task." *Ibid.*

By constructing a rationale for the jurisprudence of this Court that prevents distinguished organizations in public affairs from announcing that a candidate is qualified or not qualified for public office, the Court imposes its own model of speech, one far removed from economic and political reality. It is an unhappy paradox that this Court, which has the role of protecting speech and of barring censorship from all aspects of political life, now becomes itself the censor. In the course of doing so, the Court reveals a lack of concern for speech rights that have the full protection of the First Amendment. I would affirm the judgment.

Michigan Needs Richard Bandstra To Help Us Be Job Competitive Again

The Michigan State Chamber of Commerce, an organization of over 8,000 member companies, associations and local chambers of commerce, is committed to making Michigan more competitive for business investment and job creation. With that goal in mind, we'd like to share some facts with the electors in the 93rd House District before they vote in tomorrow's special election.

To be job competitive, Michigan needs to have fair regulatory policies on business regarding such important issues as workers' compensation and we need to encourage greater efficiency in state government by lowering the state personal income tax.

Currently, workers' compensation costs are 20% higher in Michigan than those in neighboring states. Why? Our eligibility standards are not the same as most other states. Too many people are allowed to qualify for too long a period of a time.

Many Grand Rapids businesses are competing with firms in other states having lower regulatory costs. Unless checked, this disadvantage may continue to cost Michigan jobs . . . jobs that are lost when businesses leave Michigan, expand out of state, or when outstate companies seeking to expand don't locate here in Michigan.

To ensure that Michigan is job competitive, we need legislators at the State Capitol who will show courage and stand up to special interests that advocate greater regulation and taxes.

The Michigan State Chamber of Commerce believes Richard Bandstra has the background and training to do the best job in Lansing for the people of the 93rd House District. We believe he will work to reduce workers' compensation costs and for an early rollback of the personal income tax rate.

The State Chamber is committed to job development in Michigan. We believe Richard Bandstra shares that commitment.

On Monday June 10th, Elect Richard Bandstra State Representative 93rd House District Special Election

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UNITED STATES DEPARTMENT OF LABOR *v.* TRIPLETT ET AL.

CERTIORARI TO THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 88–1671. Argued January 16, 1990—Decided March 27, 1990*

The Black Lung Benefits Act of 1972 prohibits attorneys from receiving fees for representing claimants except as approved by petitioner Department of Labor. In implementing this provision, the Department promulgated approval procedures which, *inter alia*, invalidate all contractual fee arrangements. Respondent Triplett (hereinafter respondent), an attorney, violated the Department's fee scheme when he agreed to represent claimants on a contingent-fee basis and collected fees without the required approval. Petitioner Committee on Legal Ethics of the West Virginia State Bar recommended that he be suspended for these infractions and filed a complaint in the West Virginia Supreme Court of Appeals to enforce the sanction. The court denied enforcement, ruling that the scheme was unconstitutional because it effectively denied claimants necessary access to counsel and, alternatively, because it denied them the procedural safeguards provided by the Act.

Held:

1. Both sides have standing. The committee has standing on the basis of its classic interest as a government prosecuting agency in defending the law on which its prosecution is based, and there is therefore no need to inquire into the Department's standing. Respondent has third-party standing by virtue of his claim that enforcement of the fee scheme against him deprives his clients of a due process right to obtain legal representation. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 954–958. *ASARCO Inc.* v. *Kadish*, 490 U. S. 605, distinguished. There is no question that such a right is placed at issue here, since at least one of respondent's clients received benefits that the Government was seeking to recover as erroneously paid. Pp. 719–721.

2. The Department's fee limitation scheme does not violate due process. Pp. 721–727.

(a) In light of the Government's obvious and legitimate interest in protecting claimants and others who may be required by the Act to pay

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*Together with No. 88–1688, *Committee on Legal Ethics of the West Virginia State Bar* v. *Triplett et al.*, also on certiorari to the same court.

fees, the Department's scheme is entitled to a heavy presumption of constitutionality. Respondent must prove that the scheme made attorneys unavailable to his prospective clients at the time he violated the Act. See *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305. The "factual record" upon which the state court relied is blatantly insufficient to meet respondent's burden. The only nonanecdotal evidence in the record powerfully suggests that claimants whose chances of success are high enough to attract contingent-fee lawyers have no difficulty finding them. Pp. 721–726.

(b) The state court's alternative holding that the fee scheme violated due process by depriving claimants of statutory procedural safeguards, including the right to counsel, is disposed of by the conclusion that they have not been deprived of their asserted constitutional right to representation. Pp. 726–727.

180 W. Va. 533, 378 S. E. 2d 82, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in Parts I, II–A, III, and IV of which REHNQUIST, C. J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined, and in Part II–B of which REHNQUIST, C. J., and STEVENS, O'CONNOR, and KENNEDY, JJ., joined. STEVENS, J., filed a concurring opinion, *post*, p. 727. MARSHALL, J., filed an opinion concurring in the judgment, in Part II of which BRENNAN, J., joined, *post*, p. 728. BRENNAN, J., filed a separate statement, *post*, p. 736.

Michael R. Dreeben argued the cause for petitioners in both cases. With him on the briefs for petitioner in No. 88–1671 and respondent in No. 88–1688, under this Court's Rule 12.4, were *Solicitor General Starr, Assistant Attorney General Gerson, Deputy Solicitor General Roberts, William Kanter, John S. Koppel, Allen H. Feldman,* and *Edward D. Sieger*. *Jack Marden* filed a brief for petitioner in No. 88–1688 and respondent in No. 88–1671, under this Court's Rule 12.4.

Jane Moran argued the cause for respondent Triplett in both cases. On the brief was *James A. McKowen*.†

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†Briefs of *amici curiae* urging affirmance were filed for the Association of Trial Lawyers of America et al. by *Jeffrey Robert White, John P. Ellis, Joseph E. Wolfe, Russ M. Herman,* and *Michael J. Blachman;* and for the United Mine Workers of America by *Robert H. Stropp, Jr.*

JUSTICE SCALIA delivered the opinion of the Court.‡

These cases call into question the constitutionality of the Department of Labor's administration of that provision of the Black Lung Benefits Act of 1972 which prohibits the acceptance of attorney's fees for the representation of claimants, except such fees as are approved by the Department. Respondent Triplett contends that the Secretary of Labor's manner of implementing this restriction violates the Due Process Clause of the Fifth Amendment because it renders qualified attorneys unavailable and thereby deprives claimants of legal assistance in the prosecution of their claims.

I

The Black Lung Benefits Act of 1972, 83 Stat. 792, as amended, 30 U. S. C. § 901 *et seq.* (1982 ed. and Supp. V), provides federal funds to those who have been totally disabled by pneumoconiosis, a respiratory disease commonly caused by coal mine employment, and to their eligible survivors. See *Pittston Coal Group* v. *Sebben*, 488 U. S. 105, 108 (1988). The Department of Labor (Department) awards benefits after adjudication by a deputy commissioner, and after review (if requested) by an administrative law judge (ALJ), the Benefits Review Board, and a federal court of appeals. 20 CFR §§ 725.410, 725.419(a), 725.481 (1989); 30 U. S. C. § 932(a) (1982 ed., Supp. V) (incorporating 33 U. S. C. § 921(c) (1982 ed.)).

A claimant may be represented throughout these proceedings by an attorney, 20 CFR §§ 725.362, 725.363(a) (1989), and the Act provides that when the claimant wins a contested case the employer, his insurer, or (in some cases, see 30 U. S. C. § 934 (1982 ed.)) the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to the claimant's lawyer. 30 U. S. C. § 932(a) (incorporating 33 U. S. C. § 928(a) (1982 ed.)). The Act also incorporates, however, that provision of the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. 1438, as amended, 33 U. S. C. § 928(d) (1982 ed.), which prohibits an attorney from receiving a fee—whether from the employer, insurer, or Trust Fund, or from the claimant himself—unless approved by the appropriate agency or court. 30 U. S. C. § 932(a) (1982 ed., Supp. V). The Department's regulations invalidate all contractual agreements for fees, see 20 CFR §§ 725.365, 802.203(f) (1989), and the Department will not approve a fee if the claimant is unsuccessful, see *Director, OWCP* v. *Hemingway Transport Inc.*, 1 BRBS 73, 75 (1974). Once the claimant's compensation order becomes final, 33 U. S. C. § 928(a), the attorney may apply to each tribunal before whom the services were performed, 20 CFR § 725.366(a) (1989), and shall be awarded a fee "reasonably commensurate with the necessary work done," § 725.366(b), taking into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of fee requested." *Ibid.*

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‡JUSTICE WHITE and JUSTICE BLACKMUN join all but Part II–B of this opinion.

Respondent George R. Triplett (hereinafter respondent) violated these restrictions by receiving unapproved fees. He agreed to represent claimants in exchange for 25% of any award obtained, and collected those fees without the required approval. The Committee on Legal Ethics of the West Virginia State Bar initiated a disciplinary action against respondent for these infractions. The committee, after a hearing, recommended a 6-month suspension, and filed a complaint in the West Virginia Supreme Court of Appeals to enforce that sanction.

That court denied enforcement. Although respondent had not raised such a contention, it occurred to the court that the Act's restriction on payment of fees, as implemented by the Department, might violate the Due Process Clause of the

Fifth Amendment and thus be impermissible as the premise for the disciplinary action. After asking for and receiving supplemental briefing on the issue, it held the Department's implementation of the Act unconstitutional because it "effectively den[ied] claimants necessary access to counsel," and, alternatively, because it "den[ied] qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits also granted by Congress." 180 W. Va. 533, 536, 544, 378 S. E. 2d 82, 85, 93 (1988). Two justices dissented, finding the factual record upon which the majority relied "woefully inadequate." *Id.*, at 549, 378 S. E. 2d, at 98.

After issuing this opinion, the court invited the Department to intervene. The Department did so, supplemented the record, and petitioned for rehearing. The court denied the petition in a brief opinion that found the Department's proffered justifications for the fee limitation system, and its new evidence, unpersuasive. *Id.*, at 547, 378 S. E. 2d, at 96.

Both the Department (in No. 88–1671) and the committee (in No. 88–1688) petitioned for certiorari. We granted the petitions. 493 U. S. 807 (1989).

II

A

We deal first with the parties' standing. On petitioners' side, the Committee on Legal Ethics has the classic interest of a government prosecuting agency arguing for the validity of a law upon which its prosecution is based. It has preferred charges against respondent that rest upon his disregard of the fee restrictions administered by the Department; those charges cannot be sustained if the restrictions themselves are unlawful. Since the committee has standing, we need not inquire whether the Department does as well. *Bowsher* v. *Synar*, 478 U. S. 714, 721 (1986).

B

On respondent's side, Triplett invokes not his own legal rights and interests, but those of the black lung claimants who hired him. Respondent's defense to the disciplinary proceeding is that the fee scheme he is accused of violating contravenes those claimants' due process rights because, by prohibiting collection pursuant to voluntary fee agreements and failing to provide adequate alternative means of attorney compensation, it renders claimants unable to obtain legal representation for their black lung claims. Ordinarily, of course, a litigant "'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 474 (1982) (quoting *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975)). This is generally so even when the very same allegedly illegal act that affects the litigant also affects a third party. See *United States* v. *Payner*, 447 U. S. 727, 731–732 (1980) (criminal defendant "lacks [third-party] standing under the Fourth Amendment to suppress . . . documents illegally seized from" his banker). When, however, enforcement of a restriction against the litigant prevents a third party from entering into a relationship with the litigant (typically a contractual relationship), to which relationship the third party has a legal entitlement (typically a constitutional entitlement), third-party standing has been held to exist. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 954–958 (1984) (professional fundraiser given third-party standing to challenge statute limiting its commission to 25% as violation of clients' First Amendment right to hire him for a higher fee). A restriction upon the fees a lawyer may charge that deprives the lawyer's prospective client of a due process right to obtain legal representation falls squarely within this principle. See *Caplin & Drysdale, Chartered* v. *United States*, 491 U. S. 617, 623–624, n. 3 (1989).** There is no question that a due process right to representation is placed at issue here, since at least one of the claimants who retained respondent received benefits that the Government was seeking to recover as erroneously paid. See 180 W. Va., at 543, n. 31, 378 S. E. 2d, at 92, n. 31; *Walters* v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 320, n. 8 (1985).

Accordingly, we find standing on both sides of this action.

III

In *Walters* v. *National Assn. of Radiation Survivors*, *supra*, we upheld against due process attack a statutory $10 limitation on attorney's fees payable by veterans seeking disability or death benefits in proceedings before the Veterans' Administration. We began there, as we begin here, by noting the heavy presumption of constitutionality to which a "carefully considered decision of a coequal and representative branch of our Government" is entitled. *Id.*, at 319. We determined in *Walters* that the Government had an interest in administering benefits in an informal and nonadversarial fashion so that claimants would receive the entirety of an award without having to divide it with a lawyer. *Id.*, at 321–323. We accorded that interest "great weight," *id.*, at

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**We disagree with JUSTICE MARSHALL's view that *ASARCO Inc.* v. *Kadish*, 490 U. S. 605 (1989), renders our inquiry into third-party standing inappropriate. See *post*, at 729–732. Whether a litigant can assert the rights of a third party under a particular statute is "closely related to the question whether a person in the litigant's position would have a right of action on the claim," *Warth* v. *Seldin*, 422 U. S. 490, 500, n. 12 (1975). Thus, while state courts are fully entitled to entertain disputes that would not qualify as cases or controversies under Article III, it is questionable whether they have the power, by granting or denying third-party standing, to create or destroy federal causes of action. See *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D. C. 367, 381–382, and n. 12, 809 F. 2d 794, 808–809, and n. 12 (1987). We follow longstanding precedent in ascertaining the third-party standing of a respondent in a case arising from state court. See *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947, 954 (1984); *Barrows* v. *Jackson*, 346 U. S. 249 (1953).

326, and required those challenging the law to make "an extraordinarily strong showing of probability of error under the present system—and the probability that the presence of attorneys would sharply diminish that possibility—to warrant a holding that the fee limitation denies claimants due process of law." *Ibid.* Applying a similar analysis here, we conclude that the fee limitation scheme must be upheld.

The Government pursues an obvious and legitimate interest through the current regime. The regulation of attorney's fees payable by claimants themselves is designed to protect claimants from their "improvident contracts, in the interest not only of themselves and their families but of the public." *Yeiser* v. *Dysart*, 267 U. S. 540, 541 (1925) (upholding similar state limitation). When fees are payable by persons other than the claimants, as Congress has provided, regulation is designed to assure fairness to the employer, carrier, or Trust Fund, and to protect those sources from a depletion that would leave other claimants without a source of compensation. The Government has good reason, moreover, to defer payment until the compensation award is final. A regime of payment immediately upon success at every level, subject to recovery in the event the judgment in favor of the claimant is reversed at a higher level, would impose upon the payor the onerous task of seeking to obtain a refund.

In *Walters* v. *National Assn. of Radiation Survivors*, *supra*, we assumed that the fee limitation would make attorneys unavailable to claimants, but nevertheless upheld the statute because attorneys were not essential to vindicate the claims. Here, we need not reach the latter issue unless respondent has proved what was assumed in that case, viz., that the regime made attorneys unavailable to his prospective clients at the time respondent violated the Act. That showing contains two component parts: (1) that claimants could not obtain representation, and (2) that this unavailability of attorneys was attributable to the Government's fee regime. That is no small burden, and respondent has failed to bear it.

Since the due process issue in this case first arose during the original enforcement proceeding in the West Virginia Supreme Court of Appeals, no lower court had heard evidence or made factual findings. Although the committee had heard evidence concerning respondent's misconduct, it made no findings regarding the effect of the fee regime on the availability of lawyers. The "factual record" upon which the court relied to invalidate this federal program consisted of testimony by two lawyers in the disciplinary proceeding, five affidavits attached to an *amicus* brief to the court, and statements by attorneys in hearings before a House of Representatives Subcommittee in 1985. Since it is critical to our disposition of the case, we shall describe the evidence the court relied upon in some detail.

As to the first issue—unavailability of attorneys—the court relied upon three lawyers' assessments. One stated that "fewer qualified attorneys are accepting black lung claims," and that more claimants are proceeding *pro se.* 180 W. Va., at 541, 378 S. E. 2d, at 90. According to a second attorney, "few attorneys are willing to represent black lung claimants." *Ibid.* A third lawyer's evaluation was not contained in the record, but consisted of his 1985 testimony to the House subcommittee that "many of his colleagues had '. . . stated unequivocally that they would not take black lung cases . . . .'" *Id.*, at 542, 378 S. E. 2d, at 91 (quoting Hearings on Investigation of Backlog in Black Lung Cases before the Subcommittee on Labor Relations of the House Committee on Education and Labor, 99th Cong., 1st Sess., 188 (1985)). (The court did not mention the testimony of other witnesses before the Subcommittee to the opposite effect. See, *e. g., id.*, at 45.)

This will not do. We made clear in *Walters* that this sort of anecdotal evidence will not overcome the presumption of regularity and constitutionality to which a program established by Congress is entitled. 473 U. S., at 324, n. 11. The impressions of three lawyers that the current system has produced "few" lawyers, or "fewer qualified attorneys" (whatever that means), and that "many" have left the field, are blatantly insufficient to meet respondent's burden of proof, even if entirely unrebutted.

In unneeded addition, there was rebuttal here—affirmative indication that attorneys willing to take black lung cases were in adequate supply. Data submitted by the Department in support of its petition for rehearing showed that in 1987 claimants were represented by counsel at the ALJ stage in 92% of cases resulting in grant or denial of benefits. Although these statistics are not conclusive of adequate attorney availability (they do not show, for example, the proportion of unrepresented claimants who never reached the ALJ stage), they are the only nonanecdotal evidence in the record, and they powerfully suggest that claimants whose chances of success are high enough to attract contingent-fee lawyers have no difficulty finding them.

Even if respondent had demonstrated an unavailability of attorneys, he would have been obliged further to show that its cause was the regulation of fees. He did not do so. In finding to the contrary, the West Virginia Supreme Court of Appeals relied mainly on statements by attorneys concerning the delay in receiving payment. Of the three lawyers who claimed that there was a shortage of attorneys (see *supra*, at 723), two attributed the shortage, in part, to the delay in payment of fees. 180 W. Va., at 541, 542, 378 S. E. 2d, at 90, 91. See also *id.*, at 536, n. 6, 378 S. E. 2d, at 85, n. 6 (lawyer testified that he had not yet been paid in "three or four" cases in which he had prevailed); *id.*, at 541–542, 378 S. E. 2d, at 90–91 (testimony at congressional hearings that payment was delayed 2–3 years); *id.*, at 541, 378 S. E. 2d, at 90 (lawyer stated that he is owed more than $30,000 in fees that have been awarded but not paid). The court thought this proved that the delay built into the fee-approval system produced the unavailability of attorneys: "In a small, depressed West Virginia town $30,000 is a substantial amount of money for an individual practitioner. In the long run, as John Maynard Keynes once observed, we are all dead. In the short run, lawyers have offices to run, mortgages to pay and children to educate." *Ibid.*

The court did not explain why the Keynesian imperative of cash-on-the-barrelhead has not eliminated the contingent fee, the very institution respondent seeks to shield from regulation—which itself yields no office funds, mortgage payments, or tuition fees until often lengthy litigation is completed. The answer, of course, is that the contingent fees contracted for are high enough to compensate not only for the contingency but also for the delay until the contingency is resolved. There is no apparent reason why compensation cannot render palatable the additional delay inherent in the Department's approval procedure as well. At one point the West Virginia Supreme Court of Appeals seemed to acknowledge this, asserting that its whole case against the Department's scheme boils down to the fact that the fees are too low: "It is clear from the evidence before us that most lawyers are unwilling to represent black lung claimants because of the inadequate fees awarded by the DOL." *Id.*, at 545, 378 S. E. 2d, at 94. The evidence to support this economic assessment is similar to that for the unavailability of attorneys: small in volume, anecdotal in character, and self-interested in motivation—to wit, a portion of the affidavit of one claimants' attorney who has not abandoned the practice. *Id.*, at 541, 378 S. E. 2d, at 90 (citing Muth affidavit). On the face of the matter, it is difficult to understand how the Department could maintain a system of inadequate fees if it wanted to. The statute itself requires that the fees awarded be "reasonable," see 33 U. S. C. §928(a) (1982 ed.); 30 U. S. C. §932(a) (1982 ed., Supp. V), which the agency has interpreted to include a requirement that they compensate for delay, cf. *Hobbs* v. *Director, OWCP,* 820 F. 2d 1528, 1529 (CA9 1987) (applying LHWCA); and where the statutory requirement is not observed, the dissatisfied attorney has a remedy in the appropriate court of appeals, see 33 U. S. C. §§921(c), 928(a) (1982 ed.); 30 U. S. C. §932(a) (1982 ed., Supp. V); *Hobbs* v. *Director, OWCP, supra.*

To establish the requisite causality between the Department's scheme and the (alleged) unavailability of attorneys, the court also relied upon the impressions of the three lawyers (see *supra*, at 723) who attributed the departure of many black lung attorneys to the risk of nonrecovery if the claimant loses. 180 W. Va., at 541–542, 378 S. E. 2d, at 90–91. But as noted above, the existence in this country of a thriving contingent-fee practice demonstrates that this risk can be compensated for—so it comes down once again to the level of compensation. And we note that the Benefits Review Board has construed the regulations of the Secretary of Labor governing the award of attorney's fees to permit consideration of the attorney's risk of going unpaid. See *Risden* v. *Director, OWCP*, 11 BRBS 819, 824 (1980).

Finally, to establish the necessary causality the court relied on the conclusory impressions of interested lawyers as to the effect of the Department's fee regime on the availability of attorneys. One lawyer, for example, whose experience consisted of representing two claimants prior to 1981, said that he did not take black lung cases because of the difficulty in obtaining fees. 180 W. Va., at 536, n. 6, 378 S. E. 2d, at 85, n. 6; Tr. 206. Cf. 180 W. Va., at 542, 378 S. E. 2d, at 91. Perhaps so; but that does not come close to proving that the fee regime dried up the supply of attorneys.

In sum, the evidence relied upon by the West Virginia Supreme Court of Appeals did not remotely establish *either* that black lung claimants are unable to retain qualified counsel *or* that the cause of such inability is the attorney's fee system administered by the Department. The court therefore had no basis for concluding that that system deprives claimants of property without due process of law.

IV

It is not clear to us what the West Virginia Supreme Court of Appeals meant by what it described as its "independent basis" for finding a due process violation, which was set forth as follows:

> "Congress has conferred upon qualified claimants the right to receive black lung benefits. Congress has also prescribed the remedy (the claims process) to guarantee this right, an essential part of which is the right to counsel. It is, therefore, unconstitutional for the Department of Labor by its regulations to deny qualified claimants the procedural safeguards provided by Congress that are essential to vindicate the right to benefits also granted by Congress." *Id.*, at 544, 378 S. E. 2d, at 93.

It seems to us this adds nothing to the prior analysis except the assertion that the right to counsel, besides being constitutionally required (as we have earlier assumed), was part of the statutory "remedy" prescribed by Congress. If that were so, of course, it would not be necessary to invoke the Due Process Clause, since in denying the right the Department of Labor would be violating the statute. In any case, the asserted basis is not "independent"—or at least not independent of the central proposition that black lung claimants have been deprived of their ability to obtain counsel. Our conclusion that that proposition has not remotely been established disposes of the West Virginia Supreme Court of Appeals' alternative ground of decision as well.

* * *

The judgment of the West Virginia Supreme Court of Appeals is reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

JUSTICE STEVENS, concurring.

The Government unquestionably has a legitimate interest in preventing lawyers from overcharging program beneficiaries. It may, therefore, enforce regulations prohibiting unreasonable fees. For the reasons stated in my dissent in

Walters v. *National Assn. of Radiation Survivors*, 473 U. S. 305, 358–372 (1985), however, I remain convinced that such regulation may not be so pervasive as to deny the individual the right to consult and retain independent counsel. In this action I agree with the Court that respondent Triplett has failed to prove that the regulations have this effect.

With regard to my colleagues' comments on *ASARCO Inc.* v. *Kadish*, 490 U. S. 605 (1989), I add this observation. In that case we carefully considered the question "whether, under federal standards, the case was nonjusticiable at its outset because the original plaintiffs lacked standing to sue," *id.*, at 612; only thereafter did we address the separate question whether, in the circumstances of that case, the entry of a state-court judgment that caused concrete injury to the parties made it appropriate to examine justiciability at a later stage in the proceedings. It is entirely appropriate for the Court to follow the same procedure in this action.

Accordingly, I join the Court's opinion and judgment.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins as to Part II, concurring in the judgment.

In the context of an attorney disciplinary action, the West Virginia Supreme Court of Appeals held the provision of the Black Lung Benefits Act of 1972 that governs attorney's fees awarded to counsel for a successful claimant, 83 Stat. 796, as amended, 30 U. S. C. § 932(a) (1982 ed., Supp. V), unconstitutional as applied. I agree with the Court's decision to reverse this judgment because the evidence supporting it does not establish that the Department of Labor's regulation of attorney's fees deprives black lung claimants of adequate legal assistance. *Ante*, at 726. Nevertheless, I write separately to underscore the limited nature of the Court's holding.

I

Before the Court proceeds to the merits of this litigation, it discusses the standing of petitioners *and* respondent Triplett (hereinafter respondent). I agree that we must examine the standing of one of the petitioners and that petitioners can seek review in this Court. *Ante,* at 719. I am bewildered, however, by the Court's lengthy discussion of respondent's standing to assert the due process rights of black lung claimants. *Ante,* at 720–721. As long as one of the petitioners has standing and the litigation presents a live case or controversy, this Court has jurisdiction on certiorari from a state-court judgment even if, had the state court applied federal standing requirements, the respondent would have lacked standing. *ASARCO Inc.* v. *Kadish,* 490 U. S. 605, 623–624 (1989). The rule we announced so recently in *ASARCO* renders examination of respondent's standing in the state courts through the lens of federal standing principles completely irrelevant. To the extent that the Court's extended treatment of the issue implies otherwise, it is blatantly inconsistent with our precedent.

In *ASARCO,* the petitioners sought review of a state-court decision on a federal issue in favor of the respondents, who were the plaintiffs in state court. The United States as *amicus curiae* argued that this Court should dismiss the case because the respondents would not have satisfied the standing requirements for bringing the suit in a federal district court. *Id.,* at 620. This Court held, however, that the respondents were not required to meet federal standing requirements. Rather, only the parties "first invoking the authority of the federal courts in th[at] case," the petitioners, were required to prove standing. *Id.,* at 624. See also *id.,* at 617–618.

The *ASARCO* Court began its analysis with the well-established rule that "state courts are not bound to adhere to federal standing requirements [even though] they possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretations of federal law." *Id.,* at 617. The Court then reasoned that if it were to examine the respondents' standing and determine that the respondents failed to satisfy federal standing requirements, the only logical course would be to dismiss the case, leaving the state-court judgment intact. See *id.*, at 620–621.[1] The unavailability of federal review of such a state-court judgment would undermine the preclusive effect of that judgment on subsequent litigation between the parties in federal court, because a state-court judgment on a federal issue normally has collateral-estoppel effect in federal court only if the state-court judgment was subject to federal review. *Id.*, at 621–622. A state court that sought to render a *binding* decision on a federal issue would be forced to adhere to federal standing requirements to ensure the availability of federal review. *Id.*, at 622. The *ASARCO* Court concluded, therefore, that dismissing the case on the ground that the respondents lacked standing under federal principles would effectively impose those federal requirements on state courts.

The Court's decision in *ASARCO* clearly forecloses the need for any examination of whether respondent here satisfies federal standing requirements. It is of no importance that the standing issue raised in this case is whether respondent can raise the claims of third parties, whereas the issue in *ASARCO* was whether the respondent taxpayers and teachers association had shown distinct, concrete injury fairly traceable to the state statute and likely to be redressed by the requested relief. The general principle that a party must raise his own legal rights and interests and not those of third parties, and the limited exceptions to that principle, are part of the same set of standing requirements devised by this Court to limit the category of parties who may seek relief in federal court. See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 474 (1982). Nothing in *ASARCO* suggests that some of the federal standing requirements are applicable to the States, while others are not.[2]

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[1] The *ASARCO* Court also considered the possibility of vacating the state-court judgment if it were to find that the respondents did not meet federal standing requirements. *ASARCO Inc.* v. *Kadish*, 490 U. S., at 620. As with dismissal, the "clear effect" of vacating the state-court judgment "would be to impose federal standing requirements on the state courts whenever they adjudicate issues of federal law, if those judgments are to be conclusive on the parties." *Ibid.* The Court concluded, however, that vacating the state-court judgment would not be "a proper exercise of our authority . . . . It would be an unacceptable paradox to exercise jurisdiction to confirm that we lack it and then to interfere with a State's sovereign power by vacating a judgment rendered within its own proper authority." *Ibid.* See also *id.*, at 621, n. 1. Thus, vacating the state-court judgment would not be an appropriate option for the Court in this context. If the Court were to apply federal standing requirements to a respondent and find that he did not satisfy the requirements, the proper course of action would be to dismiss the case, thereby leaving the state-court judgment undisturbed.

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[2] Indeed, had the *ASARCO* Court found that third-party standing issues deserved different treatment, it presumably would have distinguished the decision in *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, 467 U. S. 947 (1984), on that ground, as that case involved the issue whether the respondents (again, the plaintiffs in state court below) had standing to raise the rights of third parties. See *id.*, at 954–958. Notably, however, the Court distinguished that case instead on the ground that the Court there had found that the respondents satisfied federal standing requirements, "which obviated any further inquiry." *ASARCO, supra*, at 623, n. 2.

Contrary to the Court's assertion, declining to examine a respondent's third-party standing would not enable state courts "to create . . . federal causes of action." *Ante*, at 721, n. Rather, it would simply allow States to permit a suit under an *established* federal cause of action by a party who might be precluded by federal third-party standing doctrine from bringing the same suit in federal court. This result is precisely what *ASARCO* requires. Whether a party would have a "*right* of action on [a] claim," *Warth* v. *Seldin*, 422 U. S. 490, 500, n. 12 (1975) (emphasis added), is the same question as whether that party has standing. That question is distinct from the question whether any claim—any *cause* of action—exists at all. "Third-party standing" is exactly what one would expect from its name—a doctrine concerning a party's *standing* to assert an existing federal claim.

The only cases of *this* Court that the majority cites in support of its analysis predate our decision in *ASARCO*. The Court of Appeals opinion relied on by the Court for its novel assertion actually supports the applicability of the *ASARCO* analysis to third-party standing. In a discussion of such standing, the lower court stated: "[T]he Supreme Court may review a

Because respondent has not invoked the authority of any federal court, then, federal standing principles are simply inapplicable to him. Under this Court's clear pronouncement in *ASARCO*, the only relevant question for us here is whether one of the petitioners has standing to seek review by this Court of the state court's judgment. As in *ASARCO*, these petitioners have standing because "[t]he state proceedings ended in a . . . judgment adverse to petitioners, an adjudication of legal rights which constitutes the kind of injury cognizable in this Court on review from the state courts." *ASARCO*, 490 U. S., at 618. The injury to the Committee on Legal Ethics is the nonenforcement of its disciplinary action. This injury is directly traceable to the state high court's judgment and can be redressed by a decision of this Court.

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case from a state court although standing would have been lacking under the Court's prudential rules if the case had been brought in a federal district court." *Haitian Refugee Center* v. *Gracey*, 257 U. S. App. D. C. 367, 381, n. 12, 809 F. 2d 794, 808, n. 12 (1987) (citing *Revere* v. *Massachusetts General Hospital*, 463 U. S. 239 (1983)). See also Monaghan, Third Party Standing, 84 Colum. L. Rev. 277, 292 (1984).

Even if *ASARCO* did not so clearly foreclose, in the context of review of a state-court judgment, application of federal standing requirements to a respondent, it would make no sense to apply the third-party standing doctrine when a state court has already allowed that respondent to raise the rights of third parties and has issued a final judgment on the issues. The limitation on third-party standing permits federal courts to avoid "'unnecessary pronouncement on constitutional issues,'" and assures that the issues raised will be "concrete and sharply presented." *Secretary of State of Maryland* v. *Joseph H. Munson Co.*, *supra*, at 955 (quoting *United States* v. *Raines*, 362 U. S. 17, 22 (1960)) (footnote omitted). This Court's resolution of a constitutional issue cannot be characterized as "unnecessary" once the state court has already rendered a ruling on it in the respondent's favor. See *Revere*, *supra*, at 243; *supra*, at 729–730. Moreover, the concern that the controversy be "concrete and sharply presented" is fully satisfied by ascertaining that "the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, [and that] the requisites of a case or controversy are also met." *ASARCO*, *supra*, at 623–624.

II

Turning to the merits, I find it readily apparent that attorneys are necessary to vindicate claimants' rights under the Black Lung Benefits Act. As the West Virginia Supreme Court of Appeals noted, a black lung claimant must negotiate through a complex regulatory system to receive benefits from either the Black Lung Disability Trust Fund or the responsible mine operator. 180 W. Va. 538, 539, 378 S. E. 2d 82, 88 (1988). The complexity of the system is well documented. See, *e. g.*, Hearings on Investigation of Backlog in Black Lung Cases before the Subcommittee on Labor Standards of the House Committee on Education and Labor, 99th Cong., 1st Sess., 186 (1985) (statement of attorney Thomas Makowski) ("Through the years, the standards have gotten more rigorous with regard to the sufficiency of evidence needed to prove a claim that a miner has black lung. As Congress made standards stricter, the regulations became more and more confusing, not only to the claimants, but to the attorneys and the administrative law judges as well"); *id.*, at 85 (statement of attorney Robert T. Winston, Jr.) (describing the difficult task of developing evidence necessary to support a benefits award); Smith & Newman, The Basics of Federal Black Lung Litigation, 83 W. Va. L. Rev. 763 (1981) (detailing both the intricate regulatory scheme and the types of medical evidence required to prove a case).

More significantly, the black lung process is highly adversarial. Attorneys representing either the Department of Labor or the responsible mine operator actively oppose the award of benefits to a claimant at all levels of the black lung system. Because an operator faces the prospect of paying significant awards, it is often willing to pay substantial legal fees to defend against black lung claims. See Hearings, *supra*, at 22 (testimony of attorney Martin Sheinman). As we acknowledged in *Walters* v. *National Assn. of Radiation Survivors (NARS)*, 473 U. S. 305 (1985), participation of counsel in administrative proceedings "'inevitably give[s] the proceedings a more adversary cast.'" *Id.*, at 325 (quoting *Wolff* v. *McDonnell*, 418 U. S. 539, 570 (1974)). The black lung benefits system is thus qualitatively different from the Veterans' Administration system, which "is designed to function throughout with a high degree of informality and solicitude for the claimant." *NARS, supra*, at 311.

By specifically providing for lawyers and for the payment of reasonable attorney's fees in black lung cases, 30 U. S. C. § 932(a) (1982 ed., Supp. V) (incorporating 33 U. S. C. § 928(a) (1982 ed.)), Congress acknowledged that legal representation is crucial to black lung claimants' success in this complex, adversarial process. Cf. *NARS, supra*, at 321 (Congress intended that Veterans' Administration system be managed so as to avoid the need for attorneys). An unsophisticated and desperately ill miner, unfamiliar with legal concepts and practices, is at a severe disadvantage when he faces the expert lawyers of the Government or operators without professional assistance of his own. If the system operates so that claimants cannot obtain representation, it undoubtedly denies those claimants their right to due process.

Although representation is necessary to protect claimants' rights under the Act, I agree with the Court that the West Virginia Supreme Court of Appeals had insufficient grounds for holding that the Department of Labor's regulation of attorney's fees deprives claimants of adequate legal assistance.[3] The Court's holding today, however, in no way precludes a future constitutional challenge to the Department's implementation of the Act, founded on a more developed factual record.

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[3] The Court should not be surprised at the paucity of facts about representation of black lung claimants. When the writ of certiorari was granted, the Court was aware that the issue presented by the litigation had been raised for the first time before the State Supreme Court of Appeals, that it was only indirectly implicated in an attorney disciplinary action, and that the Department of Labor had not been a party when the issue was first resolved. Moreover, it was evident that the Government's late intervention in the case did not result in the development of an extensive record. And, most importantly, the Court was aware that such a record would be required before such a challenge to the entire regulatory scheme

Finally, I emphasize the Court's observation that the current fee structure should compensate attorneys for any delay in payment and for the contingent nature of claims. *Ante,* at 725–726. See also *Risden* v. *Director, OWCP,* 11 BRBS 819, 824 (1980) (Benefits Review Board holding that fee should account for contingency). The West Virginia Supreme Court of Appeals identified delay and the absence of premiums to offset the risk of loss as the cause of the dearth of attorneys willing to represent claimants. 180 W. Va., at 542, 378 S. E. 2d, at 91. When fee awards do not adequately account for these factors, individual attorneys can challenge the awards in the courts of appeals as violative of the Act's requirement of "reasonable" fees. *Ante,* at 725. If an attorney or claimant alleges that the regulations governing attorneys' fees do not allow the Department to award "reasonable" fees as required by the Black Lung Benefits Act, those regulations also may be challenged.

Although the allegations in the sparse record before us raise legitimate concerns that black lung claimants may not be able to retain legal counsel and the suspicion that this inability may stem from the Department of Labor's regulation of attorney's fees, concerns and suspicions are insufficient to justify striking down on constitutional grounds "the duly enacted and carefully considered decision of a coequal and representative branch of our Government." *NARS, supra,* at 319. Accordingly, I concur in the Court's decision today to reverse the judgment of the West Virginia Supreme Court of Appeals.

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could be evaluated properly. See *Walters* v. *National Assn. of Radiation Survivors,* 473 U. S. 305, 324, n. 11 (1985). The Court therefore should not have granted the petition in the first place, or it should have dismissed the writ as improvidently granted as soon as oral argument made manifestly clear the insufficiency of the record.

Separate statement of JUSTICE BRENNAN.

I write separately to explain why it is prudent that we not resolve the issue whether respondent Triplett (hereinafter respondent) has standing in these cases. As JUSTICE MARSHALL explains, see *ante*, at 728–732, we held in *ASARCO Inc.* v. *Kadish*, 490 U. S. 605 (1989), that if a petitioner in a case arising from a state court satisfies Article III's core standing requirements, we need not inquire whether the respondent also satisfies these requirements. Nevertheless, today the Court still inquires whether respondent is entitled to "'rest his claim . . . on the legal rights or interests of third parties,'" *ante*, at 720 (citations omitted), an inquiry heretofore characterized as a "prudential" standing limitation on the jurisdiction of federal courts.[1] The Court suggests that there might be a "third-party claim" exception to the rule of *ASARCO* because the question whether a litigant may assert the rights of a third party is "'closely related to the question whether a person in the litigant's position would have a right of action on the claim.'" *Ante*, at 721, n., quoting *Warth* v. *Seldin*, 422 U. S. 490, 500, n. 12 (1975). I take the Court to be suggesting that the traditional "third-party standing" inquiry might be reformulated as a straightforward question of substantive federal law: whether the litigant is entitled to raise the legal claim asserted, either because her own legal rights are at stake or because principles of federal law justify her status as a "private attorney general" on behalf of those absent parties whose rights are at stake.

Perhaps the Court's suggestion may provide a more coherent explanation for what is now perceived as a confusing area of standing doctrine.[2] But this suggested recharacterization, even if ultimately persuasive, would seem to depart from our present understanding,[3] and the issue has been neither briefed nor argued here. Because the requisites of "third-party standing" doctrine are satisfied, *ante,* at 720–721, it is prudent that we not decide today whether to distinguish *ASARCO* on the basis of this recharacterization.[4]

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[1] See *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U. S. 464, 474 (1982).

[2] See, *e. g.*, Fletcher, The Structure of Standing, 98 Yale L. J. 221, 243–247 (1988); Monaghan, Third Party Standing, 84 Colum. L. Rev. 277 (1984).

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[3] The Court correctly notes that, in some cases, we have observed a similarity between the "third-party standing" inquiry and a "right of action" inquiry. See, *e. g., Warth* v. *Seldin,* 422 U. S. 490, 501 (1975) ("In such instances [where the Court allowed litigants to raise the legal rights of third parties], the Court has found, in effect, that the constitutional or statutory provision in question implies a right of action in the plaintiff"). In *Warth* itself, however, we described the "third-party standing" inquiry as a "rule of self-governance . . . subject to exceptions." *Id.,* at 509. Such language suggests that we have considered the "third-party standing" inquiry to turn on the prudence of exercising jurisdiction rather than the content of substantive federal law. See also, *e. g., Secretary of State of Maryland* v. *Joseph H. Munson Co.,* 467 U. S. 947, 956 (1984) ("[T]here are situations where competing considerations outweigh any prudential rationale against third-party standing, and . . . this Court has relaxed the prudential-standing limitation when such concerns are present"); *Craig* v. *Boren,* 429 U. S. 190, 193 (1976) ("[O]ur decisions have settled that limitations on a litigant's assertion of *jus tertii* . . . stem from a salutary 'rule of self-restraint' ").

Moreover, the natural consequence of adopting the Court's suggested approach—that were "third-party standing" requirements not satisfied here, we would set aside the state-court judgment for its error in presuming that respondent was entitled as a matter of federal substantive law to raise the due process challenge—was expressly rejected in *Revere* v. *Massachusetts General Hospital,* 463 U. S. 239 (1983). There we explained that the Massachusetts "Supreme Judicial Court, of course, is not bound by the prudential limitations on *jus tertii* that apply to federal courts." *Id.,* at 243.

[4] Even assuming the Court's suggested approach were persuasive, I do not understand why we ought to address *sua sponte* the question whether respondent is entitled to litigate his due process challenge. If this is indeed a question of substantive federal law and not one of Article III jurisdiction, then we should address this question only if petitioners argued unsuccessfully below that respondent was not entitled to raise the constitutional claim and petitioners sought certiorari on this legal question. But petitioners did not do so in this case, nor did they raise the issue in their briefs or at oral argument.

CLEMONS *v.* MISSISSIPPI

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

No. 88-6873. Argued November 28, 1989—Decided March 28, 1990

At the sentencing hearing following petitioner Clemons' Mississippi capital murder conviction, the trial court instructed the jury, among other things, that, in deciding whether to impose the death penalty, it should consider the following statutory aggravating factors: (1) that the murder was committed during the course of a "robbery for pecuniary gain," and (2) that it was an "especially heinous, atrocious or cruel" killing. Finding that both aggravating factors were present and that they outweighed any mitigating circumstances, the jury sentenced Clemons to death, and the State Supreme Court affirmed. The latter court, although acknowledging that the "especially heinous" factor was constitutionally invalid under *Maynard* v. *Cartwright*, 486 U. S. 356, held that that case did not require reversal, since, *inter alia*, the court had previously given the factor a constitutional limiting construction. The court then declared that, "beyond a reasonable doubt," the jury's verdict would have been the same without the "especially heinous" factor and that death was not too great a punishment when the aggravating and mitigating circumstances were weighed against each other.

Held:

1. Even in a "weighing" State like Mississippi, it is constitutionally permissible for an appellate court to reweigh the aggravating and mitigating evidence to uphold a jury-imposed death sentence that is based in part on an invalid or improperly defined aggravating circumstance. Pp. 744-750.

(a) Nothing in the Sixth Amendment, the Eighth Amendment, or any other constitutional provision requires the jury, as opposed to the appellate court, to impose the death sentence or to make the findings prerequisite to such an imposition after the appellate court has invalidated one of two or more aggravating circumstances found by the jury. Cf., *e. g.*, *Cabana* v. *Bullock*, 474 U. S. 376, 385; *Spaziano* v. *Florida*, 468 U. S. 447. Pp. 745-746.

(b) Clemons' assertion that under Mississippi law only a jury has the authority to impose a death sentence and that he therefore has an unqualified liberty interest under the Due Process Clause of the Fourteenth Amendment to have the jury assess the consequences of the invalidation of one of the aggravating circumstances on which it has been instructed is rejected. This Court has no basis for disputing the state court's interpretation that state law did not require in these circumstances that it vacate the death sentence and remand for a new sentencing proceeding before a jury, but instead allowed it to decide for itself whether to affirm the sentence. Cf. *Bullock, supra,* at 387, and n. 4. *Hicks* v. *Oklahoma,* 447 U. S. 343, distinguished. Pp. 746–747.

(c) Also rejected is Clemons' contention that, since appellate courts are unable to fully consider and give effect to a capital defendant's sentencing-phase mitigating evidence, it violates the Eighth Amendment for such a court to undertake to reweigh aggravating and mitigating circumstances in an attempt to salvage the death sentence imposed by a jury. Nothing in appellate weighing or reweighing is at odds with contemporary standards of fairness or is inherently unreliable and likely to result in arbitrary imposition of the death sentence. Appellate courts routinely decide whether the evidence supports a jury verdict and, in weighing-state capital cases, consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed. Moreover supreme courts in death penalty States may well review many death sentences, while typical jurors will serve on only one such case during their lifetimes. Thus, state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on his circumstances, background, and crime. Furthermore, contrary to Clemons' claim, an appellate court is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written jury findings. Pp. 748–750.

2. However, the case must be remanded because it is unclear whether the State Supreme Court correctly employed reweighing. Although the opinion below contains indications that the court properly performed a weighing function either by disregarding entirely the "especially heinous" factor and weighing only the remaining aggravating circumstance against the mitigating evidence or by including in the balance the "especially heinous" factor as narrowed by its prior decisions, the opinion can also be read as creating an automatic rule that, when an aggravating circumstance relied on by the jury has been invalidated, the sentence may be affirmed as long as there remains at least one valid and undisturbed aggravating circumstance. Such an automatic rule in a weighing State would be invalid under *Lockett* v. *Ohio,* 438 U. S. 586, and *Eddings* v. *Oklahoma,* 455 U. S. 104, for it would not give defendants the necessary individualized treatment that would result from actual weighing. Moreover, in light of the virtual silence of the opinion below as to Clemons' allegedly mitigating evidence, it is unclear whether the court gave that evidence sufficient consideration. Pp. 750–752.

3. Even if, under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury, function,

it would be constitutionally permissible for the State Supreme Court to apply harmless-error analysis to the jury's consideration of the invalid aggravating circumstance. See, *e. g.*, *Barclay* v. *Florida*, 463 U. S. 939. However, the case must be remanded because it is unclear whether the court below correctly employed such analysis. If the court's cryptic holding is read to suggest that it was "beyond a reasonable doubt" that the sentence would have been the same even if there had been no "especially heinous" instruction and only the "robbery for pecuniary gain" aggravating circumstance was to be balanced against the mitigating circumstances, the ultimate conclusion that the giving of the invalid instruction was harmless requires a detailed explanation based on the record, in light of the fact that the State repeatedly emphasized and argued the invalid factor during the sentencing hearing and placed little emphasis on the other factor. Moreover, although it is possible that the court intended to ask whether beyond reasonable doubt the result would have been the same had the invalid factor been properly defined in the jury instructions, and that on this basis it could have determined that the failure to instruct properly was harmless error, it is not clear that the court meant to follow this course. Pp. 752–754.

535 So. 2d 1354, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, *post*, p. 755. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BRENNAN, MARSHALL, and STEVENS, JJ., joined, *post*, p. 756.

Kenneth S. Resnick argued the cause and filed a brief for petitioner.

Marvin L. White, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Mike Moore*, Attorney General.*

**Mark D. Schneider* filed a brief for the Mississippi Capital Defense Resource Center, Inc., as *amicus curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of California et al. by *John K. Van de Kamp*, Attorney General of California, *Richard B. Iglehart*, Chief Assistant Attorney General, *John H. Sugiyama*, Senior Assistant Attorney General, and *Ronald S. Matthias* and *Dane R. Gillette*, Deputy Attorneys General, *Don Siegelman*, Attorney General of Alabama, *Robert K. Corbin*, Attorney General of Arizona, *Duane Woodard*, Attorney General of Colorado, *John J. Kelly*, Chief State's Attorney of Connecticut, *Charles M. Oberly III*, Attorney General of Delaware, JUSTICE WHITE delivered the opinion of the Court.

The Mississippi Supreme Court upheld the death sentence imposed on Chandler Clemons even though the jury instruction regarding one of the aggravating factors pressed by the State, that the murder was "especially heinous, atrocious, or cruel," was constitutionally invalid in light of our decision in *Maynard* v. *Cartwright*, 486 U. S. 356 (1988). Although we hold that the Federal Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by reweighing of the aggravating and mitigating evidence or by harmless-error review, we vacate the judgment below and remand, because it is unclear whether the Mississippi Supreme Court correctly employed either of these methods.

I

On the evening of April 17, 1987, petitioner Clemons complained to friends that he needed money and suggested a robbery of a pizza delivery man. Clemons used a pay telephone to order a pizza to be delivered to an apartment complex. He and two others, Calvin and Hay, went to the complex in a car and waited. When the pizza delivery vehicle arrived, Clemons and Hay got out of the car; Clemons carried a shotgun belonging to Hay. Clemons stopped and entered the

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James T. Jones, Attorney General of Idaho, *Neil F. Hartigan*, Attorney General of Illinois, *Linley E. Pearson*, Attorney General of Indiana, *Frederic J. Cowan*, Attorney General of Kentucky, *William J. Guste, Jr.*, Attorney General of Louisiana, *William L. Webster*, Attorney General of Missouri, *Brian McKay*, Attorney General of Nevada, *Peter N. Perretti, Jr.*, Attorney General of New Jersey, *Hal Stratton*, Attorney General of New Mexico, *Lacy H. Thornburg*, Attorney General of North Carolina, *Anthony J. Celebrezze, Jr.*, Attorney General of Ohio, *T. Travis Medlock*, Attorney General of South Carolina, *Roger A. Tellinghuisen*, Attorney General of South Dakota, *Charles W. Burson*, Attorney General of Tennessee, *Mary Sue Terry*, Attorney General of Virginia, *R. Paul Van Dam*, Attorney General of Utah, and *Joseph B. Meyer*, Attorney General of Wyoming.

delivery vehicle and ordered the driver, Arthur Shorter, to get out of the car. Shorter was told to take any money he had out of his pockets, which he did. Clemons then told Shorter to lie down, took a bag of money and some pizza from the delivery vehicle, and was about to return to the car where Calvin was sitting when Hay asked if Shorter had seen Clemons' face. When Clemons answered in the affirmative, Hay told him he had to kill Shorter. Shorter begged for his life but Clemons shot him and got into the car with Hay and Calvin. As they drove away, Calvin looked back and saw Shorter raise his head once. Shorter died shortly thereafter.

The three men eventually went home. Clemons disposed of the shotgun in a hole in his backyard. Calvin, however, later that night related the robbery and shooting incident to his sister's friend, who happened to be a county jailer. The next day Clemons was arrested at his home and later made a videotaped statement in which he admitted being part of the group that robbed Shorter but denied foreknowledge of the robbery plan and denied that he had been the killer. Before trial Clemons also told the Sheriff where he had hidden the gun.

Clemons was indicted for capital murder and, after a change of venue, was tried before a jury. The principal witness against Clemons was Calvin, who had entered into a plea agreement with the State of Mississippi. Clemons was convicted of capital murder and a sentencing hearing was held. At the sentencing hearing, the State presented evidence arguably establishing that two statutory aggravating factors were present in this case: (1) that the murder was committed during the course of a robbery for pecuniary gain and (2) that it was an "especially heinous, atrocious or cruel" killing. Clemons presented testimony from his mother and a psychologist regarding mitigating evidence. The State argued the "especially heinous" factor extensively and with regard to that factor the trial court instructed the jury in the bare terms of the Mississippi statute.[1] The jury was further instructed several times that it need not sentence Clemons to death even if it found that no mitigating circumstances were present. The jury sentenced Clemons to death, finding that both aggravating factors argued by the State were present and that they outweighed any mitigating circumstances.

Clemons appealed his conviction and sentence to the Mississippi Supreme Court, and that court affirmed. 535 So. 2d 1354 (1988). After rejecting Clemons' arguments regarding guilt and several of his challenges to the sentencing proceeding, the court addressed the validity of the "especially heinous" aggravating factor even though Clemons had never raised the issue. The court began by noting that our decision in *Maynard* v. *Cartwright*, *supra*, had invalidated Oklahoma's identical "especially heinous, atrocious, or cruel" aggravating circumstance because it was unconstitutionally vague and did not provide sufficient guidance to the jury in deciding whether to impose the death penalty. The court also recognized that we had refused to sustain the death penalty in *Maynard*, even though valid aggravating circumstances remained, because Oklahoma had no procedure for salvaging death sentences under such circumstances and that we had left the question of the effect of possible constitutional limiting constructions of the "especially heinous" factor to the Oklahoma courts in the first instance.

The Mississippi Supreme Court distinguished this case from *Maynard* and sustained Clemons' death sentence on the following grounds: (1) in Mississippi there is an established procedure that "when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict," 535 So. 2d, at 1362 (citing cases); (2) the Mississippi Supreme Court has previously given the "especially heinous" factor a constitutional limiting construction, narrowing that category to murders that are conscienceless or pitiless and unnecessarily torturous to the victim, *id.*, at 1363 (citing *Coleman* v. *State*, 378 So. 2d 640, 648 (1979)); and (3) the trial court gave the jury no less than seven instructions that "singly and collectively told the jury that regardless of aggravating circumstances, they were not required to impose the death penalty," even "if . . . there were no mitigating circumstances." 535 So. 2d, at 1364 (citing instructions).

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[1] The court instructed the jury as follows: "Consider only the following elements, if any, of aggravation in determining whether the death penalty should be imposed: . . . (2) The Capital offense was especially heinous, atrocious, or cruel." App. 25. This language is identical to that in Miss. Code Ann. § 99–19–101(5)(h) (Supp. 1989), which provides that "[a]ggravating circumstances shall be limited to the following: . . . (h) The capital offense was especially heinous, atrocious or cruel."

The court then stated that given all of these considerations plus "the brutal and torturous facts surrounding the murder of Arthur Shorter . . . it is inescapable that *Maynard* v. *Cartwright* does not dictate the outcome of the case sub judice." *Ibid.* The court added that "[w]e likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the 'especially heinous, atrocious or cruel' aggravating circumstance." *Ibid.* Finally, the court conducted its proportionality review. The court noted that it had reviewed the record and stated that "[i]n our opinion . . . the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other . . . ." *Id.*, at 1365. Three justices dissented, arguing that the sentence should be vacated and the case remanded to a jury for resentencing with properly defined aggravating factors. We granted certiorari, 491 U. S. 904 (1989).

II

We deal first with petitioner's submission that it is constitutionally impermissible for an appellate court to uphold a death sentence imposed by a jury that has relied in part on an invalid aggravating circumstance. In *Zant* v. *Stephens*, 462 U. S. 862 (1983), we determined that in a State like Georgia, where aggravating circumstances serve only to make a defendant eligible for the death penalty and not to determine the punishment, the invalidation of one aggravating circumstance does not necessarily require an appellate court to vacate a death sentence and remand to a jury. We withheld opinion, however, "concerning the possible significance of a holding that a particular aggravating circumstance is 'invalid' under a statutory scheme in which the judge or jury is specifically instructed to weigh statutory aggravating and mitigating circumstances in exercising its discretion whether to impose the death penalty." *Id.*, at 890. In Mississippi, unlike the Georgia scheme considered in *Zant*, the finding of aggravating factors is part of the jury's sentencing determination, and the jury is required to weigh any mitigating factors against the aggravating circumstances.[2] Although these differences complicate the questions raised, we do not believe that they dictate reversal in this case.

A

Nothing in the Sixth Amendment as construed by our prior decisions indicates that a defendant's right to a jury trial would be infringed where an appellate court invalidates one of two or more aggravating circumstances found by the jury, but affirms the death sentence after itself finding that the one or more valid remaining aggravating factors outweigh the mitigating evidence. Any argument that the Constitution requires that a jury impose the sentence of death or make the findings prerequisite to imposition of such a sentence has been soundly rejected by prior decisions of this Court. *Cabana* v. *Bullock*, 474 U. S. 376 (1986), held that an appellate court can make the findings required by *Enmund* v. *Florida*, 458 U. S. 782 (1982), in the first instance and stated that "[t]he decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." 474 U. S., at 385. *Spaziano* v. *Florida*, 468 U. S. 447 (1984), ruled that neither the Sixth Amendment, nor the Eighth Amendment, nor any other constitutional provision provides a defendant with the right to have a jury determine the appropriateness of a capital sentence; neither is there a double jeopardy prohibition on a judge's override of a jury's recommended sentence. Likewise, the Sixth Amendment does not require that a jury specify the aggravating factors that permit the imposition of capital punishment, *Hildwin* v. *Florida*, 490 U. S. 638 (1989), nor does it require jury sentencing, even where the sentence turns on specific findings of fact. *McMillan* v. *Pennsylvania*, 477 U. S. 79, 93 (1986).

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[2] Mississippi Code Ann. § 99–19–101(3)(c) (Supp. 1989) provides that "[f]or the jury to impose a sentence of death, it must unanimously find . . . (c) That there are insufficient mitigating circumstances, as enumerated in subsection (6), to outweigh the aggravating circumstances."

B

To avoid the import of these cases, Clemons argues that under Mississippi law only a jury has the authority to impose a death sentence, see Miss. Code Ann. § 99–19–101 (Supp. 1989), and that he therefore has a liberty interest under the Due Process Clause of the Fourteenth Amendment in having a jury make all determinations relevant to his sentence. He therefore argues that an appellate court cannot reweigh the balance of factors when the jury has found and relied on an invalid aggravating circumstance. Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause, *Gardner* v. *Florida*, 430 U. S. 349, 358 (1977) (plurality opinion), and we have recognized that when state law creates for a defendant a liberty interest in having a jury make particular findings, speculative appellate findings will not suffice to protect that entitlement for due process purposes. *Hicks* v. *Oklahoma*, 447 U. S. 343 (1980). However, these two general propositions do not lead to the result Clemons seeks.

In *Hicks* v. *Oklahoma*, sentence had been imposed under an invalid recidivist statute that provided for a mandatory 40-year sentence. The Oklahoma Court of Criminal Appeals affirmed the sentence because it was within the range of possible sentences the jury validly could have imposed. Hicks claimed, and the State conceded, that in Oklahoma only the jury could impose sentence. We held that under state law Hicks had a liberty interest in having the jury impose punishment, an interest that could not be overcome by the "frail conjecture" that the jury "might" have imposed the same sentence in the absence of the recidivist statute. *Id.*, at 346. We specifically pointed out, however, that the Oklahoma Court of Criminal Appeals did not "purport to cure the deprivation by itself reconsidering the appropriateness" of the 40-year sentence, *id.*, at 347 (footnote omitted), thus suggesting that appellate sentencing, if properly conducted, would not violate due process of law.

Contrary to the situation in *Hicks*, the state court in this case, as it had in others, asserted its authority under Mississippi law to decide for itself whether the death sentence was to be affirmed even though one of the two aggravating circumstances on which the jury had relied should not have been, or was improperly, presented to the jury. The court did not consider itself bound in such circumstances to vacate the death sentence and to remand for a new sentencing proceeding before a jury. We have no basis for disputing this interpretation of state law, which was considered by the court below to be distinct from its asserted authority to affirm the sentence on the ground of harmless error, and which plainly means that we must reject Clemons' assertion that he had an unqualified liberty interest under the Due Process Clause to have the jury assess the consequence of the invalidation of one of the aggravating circumstances on which it had been instructed. In this respect, the case is analogous to *Cabana* v. *Bullock*, *supra*, where we specifically rejected a due process challenge based on *Hicks* because state law created no entitlement to have a jury make findings that an appellate court also could make.[3] 474 U. S., at 387, and n. 4.

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[3] We note also that although *Hicks* and a due process rationale were argued by the respondent in *Zant* v. *Stephens*, 462 U. S. 862 (1983), see Brief

C

Clemons also submits that appellate courts are unable to fully consider and give effect to the mitigating evidence presented by defendants at the sentencing phase in a capital case and that it therefore violates the Eighth Amendment for an appellate court to undertake to reweigh aggravating and mitigating circumstances in an attempt to salvage the death sentence imposed by a jury. He insists, therefore, that he is entitled to a new sentencing hearing before a jury and that the decision below must be reversed. We are unpersuaded, however, that our cases require this result. Indeed, they point in the opposite direction.

The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime. See, *e. g.*, *Spaziano* v. *Florida*, *supra*, at 460; *Zant* v. *Stephens*, 462 U. S., at 879; *Eddings* v. *Oklahoma*, 455 U. S. 104, 110–112 (1982); *Lockett* v. *Ohio*, 438 U. S. 586, 601–605 (1978) (plurality opinion); *Gregg* v. *Georgia*, 428 U. S. 153, 197 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). In scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the "twin objectives" of "measured consistent application and fairness to the accused." *Eddings*, *supra*, at 110–111. See also *Lockett*, *supra*, at 604 (emphasizing the importance of reliability). Nothing inherent in the process of appellate reweighing is inconsistent with the pursuit of the foregoing objectives.

We see no reason to believe that careful appellate weighing of aggravating against mitigating circumstances in cases such as this would not produce "measured consistent application" of the death penalty or in any way be unfair to the defendant. It is a routine task of appellate courts to decide whether the

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for Respondent, O. T. 1982, No. 81–89, pp. 37–38, and by the dissenters in *Barclay* v. *Florida*, 463 U. S. 939, 985–986 (1983), the Court implicitly rejected those arguments in both cases by refusing to address them.

evidence supports a jury verdict and in capital cases in "weighing" States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed. And, as the opinion below indicates, a similar process of weighing aggravating and mitigating evidence is involved in an appellate court's proportionality review. Furthermore, this Court has repeatedly emphasized that meaningful appellate review of death sentences promotes reliability and consistency. See, *e. g.*, *Gregg* v. *Georgia*, *supra*, at 204–206 (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Proffitt* v. *Florida*, 428 U. S. 242, 253 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.); *Dobbert* v. *Florida*, 432 U. S. 282, 295–296 (1977); *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.). It is also important to note that state supreme courts in States authorizing the death penalty may well review many death sentences and that typical jurors, in contrast, will serve on only one such case during their lifetimes. See *Proffitt*, *supra*, at 252–253. Therefore, we conclude that state appellate courts can and do give each defendant an individualized and reliable sentencing determination based on the defendant's circumstances, his background, and the crime.

This is surely the import of *Cabana* v. *Bullock*, 474 U. S. 376 (1986), which held that a state appellate court could make the finding that *Enmund* v. *Florida*, 458 U. S. 782 (1982), required for the imposition of the death penalty, *i. e.* whether the defendant had killed, attempted to kill, or intended to kill. *Wainwright* v. *Goode*, 464 U. S. 78 (1983) *(per curiam)*, is likewise instructive. There, a Florida trial judge relied on an allegedly impermissible aggravating circumstance ("future dangerousness") in imposing a death sentence on Goode. The Florida Supreme Court conducted an independent review of the record, reweighed the mitigating and aggravating factors, and concluded that the death penalty was warranted. In a federal habeas proceeding, Goode then successfully challenged the trial court's reliance on the allegedly impermissible factor. We reversed the grant of the writ and concluded that even if the trial judge relied on a factor not available for his consideration under Florida law, the sentence could stand. "Whatever may have been true of the sentencing judge, there is no claim that in conducting its independent reweighing of the aggravating and mitigating circumstances the Florida Supreme Court considered Goode's future dangerousness. Consequently there is no sound basis for concluding that the procedures followed by the State produced an arbitrary or freakish sentence forbidden by the Eighth Amendment." *Id.*, at 86–87.[4]

We accordingly see nothing in appellate weighing or reweighing of the aggravating and mitigating circumstances that is at odds with contemporary standards of fairness or that is inherently unreliable and likely to result in arbitrary imposition of the death sentence. Nor are we impressed with the claim that without written jury findings concerning mitigating circumstances, appellate courts cannot perform their proper role. In *Spaziano* and *Proffitt*, we upheld the Florida death penalty scheme permitting a trial judge to override a jury's recommendation of life even though there were no written jury findings. An appellate court also is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written jury findings.

III

Clemons argues that even if appellate reweighing is permissible, the Mississippi Supreme Court did not actually reweigh the evidence in this case and instead simply held that when an aggravating circumstance relied on by the jury has been invalidated, the sentence may be affirmed as long as there remains at least one valid and undisturbed aggravating circumstance, an approach that requires no weighing whatsoever. The State on the other hand insists that a proper reweighing of aggravating circumstances was undertaken.

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[4] Along similar lines, in *Solem* v. *Helm*, 463 U. S. 277 (1983), the Court concluded that appellate courts are capable of comparing the propriety of different criminal sentences and noted that "[t]he easiest comparison, of course, is between capital punishment and noncapital punishments, for the death penalty is different from other punishments in kind rather than degree." *Id.*, at 294 (footnote omitted).

We find the opinion below unclear with respect to whether the Mississippi Supreme Court did perform a weighing function, either by disregarding entirely the "especially heinous" factor and weighing only the remaining aggravating circumstance against the mitigating evidence, or by including in the balance the "especially heinous" factor as narrowed by its prior decisions and embraced in this case. At one point the court recites the proper limiting construction of the "especially heinous" aggravating factor, 535 So. 2d, at 1363, and at times the court's opinion seems to indicate that the court was reweighing the mitigating circumstances and both aggravating factors by applying the proper definition to the "especially heinous" factor. For example, at one point the court refers to the "brutal and torturous facts" surrounding Shorter's murder and elsewhere states that "the punishment of death is not too great when the aggravating and mitigating circumstances are weighed against each other." *Id.*, at 1364, 1365. At other times, however, the opinion indicates that the court may have been employing the other approach and disregarding the "especially heinous" factor entirely. "[T]his Court (Mississippi) has held and established unequivocally through the years that when one aggravating circumstance is found to be invalid or unsupported by the evidence, a remaining valid aggravating circumstance will nonetheless support the death penalty verdict." *Id.*, at 1362.

In addition, although the latter statement does not necessarily indicate that no reweighing was undertaken, the court's statement can be read as a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance. If that is what the

Mississippi Supreme Court meant, then it was not conducting appellate reweighing as we understand the concept. An automatic rule of affirmance in a weighing State would be invalid under *Lockett* v. *Ohio*, 438 U. S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), for it would not give defendants the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances. Cf. *Barclay* v. *Florida*, 463 U. S. 939, 958 (1983) (plurality opinion). Additionally, because the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must, therefore, vacate the judgment below, and remand for further proceedings, insofar as the judgment purported to rely on the State Supreme Court's reweighing of aggravating and mitigating circumstances. Cf., *Cabana* v. *Bullock*, 474 U. S., at 390–392.

IV

Even if under Mississippi law, the weighing of aggravating and mitigating circumstances were not an appellate, but a jury, function, it was open to the Mississippi Supreme Court to find that the error which occurred during the sentencing proceeding was harmless. See, *e. g., Satterwhite* v. *Texas*, 486 U. S. 249 (1988). As the plurality in *Barclay* v. *Florida*, *supra*, opined, the Florida Supreme Court could apply harmless-error analysis when reviewing a death sentence imposed by a trial judge who relied on an aggravating circumstance not available for his consideration under Florida law:

> "Cases such as [those cited by the petitioner] indicate that the Florida Supreme Court does not apply its harmless-error analysis in an automatic or mechanical fashion, but rather upholds death sentences on the basis of this analysis only when it actually finds that the error is

> harmless. There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. . . . 'What is important . . . is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime.' *Zant,* [462 U. S.], at 879 (emphasis in original)." *Id.,* at 958.

Clemons argues, however, that the Mississippi Supreme Court incorrectly applied the harmless-error rule, that the court acted arbitrarily in applying it to his case when it refused to do so in a similar case, and that the State failed to prove beyond a reasonable doubt that any error was harmless.

With regard to harmless error, the Mississippi Supreme Court made only the following statement: "We likewise are of the opinion beyond a reasonable doubt that the jury's verdict would have been the same with or without the 'especially heinous, atrocious or cruel' aggravating circumstance." 535 So. 2d, at 1364. Although the court applied the proper "beyond a reasonable doubt" standard, see *Chapman* v. *California,* 386 U. S. 18, 24 (1967), its cryptic holding suggests that it was beyond reasonable doubt that the sentence would have been the same even if there had been no "especially heinous" instruction at all and only the aggravating circumstance that the murder was committed in the course of a robbery for pecuniary gain was to be balanced against the mitigating circumstances. We agree that it would be permissible to approach the harmless-error question in this fashion, but if this is the course the court took, its ultimate conclusion is very difficult to accept. As Clemons points out, the State repeatedly emphasized and argued the "especially heinous" factor during the sentencing hearing. The State placed little emphasis on the "robbery for pecuniary gain" factor. Under these circumstances, it would require a detailed explanation based on the record for us possibly to agree that the error in giving the invalid "especially heinous" instruction was harmless.

It is perhaps possible, however, that the Mississippi Supreme Court intended to ask whether beyond reasonable doubt the result would have been the same had the especially heinous aggravating circumstance been properly defined in the jury instructions; and perhaps on this basis it could have determined that the failure to instruct properly was harmless error. Because we cannot be sure which course was followed in Clemons' case, however, we vacate the judgment insofar as it rested on harmless error and remand for further proceedings.

V

Nothing in this opinion is intended to convey the impression that state appellate courts are required to or necessarily should engage in reweighing or harmless-error analysis when errors have occurred in a capital sentencing proceeding. Our holding is only that such procedures are constitutionally permissible. In some situations, a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless-error analysis extremely speculative or impossible. We have previously noted that appellate courts may face certain difficulties in determining sentencing questions in the first instance. See *Caldwell* v. *Mississippi*, 472 U. S. 320, 330–331 (1985). Nevertheless, that decision is for state appellate courts, including the Mississippi Supreme Court in this case, to make.[5]

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[5] We find unpersuasive Clemons' argument that the Mississippi Supreme Court's decision to remand to a sentencing jury in *Johnson* v. *State*, 511 So. 2d 1333 (1987), rev'd, 486 U. S. 578 (1988), on remand, 547 So. 2d 59 (1989), a case in which this Court reversed the death sentence because it depended in part on a jury finding that the "especially heinous" aggravating factor was present, indicates that the Mississippi Supreme Court acted arbitrarily in refusing to do the same in this case. *Johnson* is distinguishable because in that case the jury had found both that the defendant had been convicted of a prior violent felony and that the murder was especially heinous, atrocious, or cruel. In fact, the prior conviction the jury relied upon had been vacated and thus the jury was permitted to con-

VI

For the foregoing reasons the judgment of the Mississippi Supreme Court is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

So ordered.

JUSTICE BRENNAN, concurring in part and dissenting in part.

I concur in the Court's holding that the judgment of the Mississippi Supreme Court must be vacated. I join JUSTICE BLACKMUN's separate opinion, however, rejecting the suggestion that a state court can save a death sentence by "reweighing" aggravating and mitigating circumstances. Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the

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sider inadmissible evidence in determining the defendant's sentence. This Court noted in vacating the sentence that the Mississippi Supreme Court's refusal to rely on harmless-error analysis in upholding the sentence was "plainly justified" because the error "extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible" and in fact permitted the jury "to consider evidence that [was] revealed to be materially inaccurate." 486 U. S., at 590. The Court did not hold that the Mississippi Supreme Court could not have applied harmless-error analysis.

Given that two aggravating factors had been invalidated and inadmissible evidence had been presented to the jury, it was not unreasonable for the Mississippi Supreme Court to conclude that it could not conduct the harmless-error inquiry or adequately reweigh the mitigating factors and aggravating circumstances in *Johnson.* By contrast, in this case there is no serious suggestion that the State's reliance on the "especially heinous" factor led to the introduction of any evidence that was not otherwise admissible in either the guilt or sentencing phases of the proceeding. All of the circumstances surrounding the murder already had been aired during the guilt phase of the trial and a jury clearly is entitled to consider such evidence in imposing sentence. A state appellate court's decision to conduct harmless-error analysis or to reweigh aggravating and mitigating factors rather than remand to the sentencing jury violates the Constitution only if the decision is made arbitrarily. We cannot say that the Mississippi Supreme Court's refusal to remand in this case was rendered arbitrary by its decision to remand in *Johnson.*

Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227 (1976) (BRENNAN, J., dissenting), I would direct that the proceedings on remand be circumscribed so as to preclude the reimposition of the death sentence.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE STEVENS join, concurring in part and dissenting in part.

I agree that Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance provided insufficient guidance to the sentencing jury,[1] and that the Supreme Court of Mississippi did not articulate a satisfactory basis for affirming the death sentence imposed upon Chandler Clemons. I therefore concur in the Court's holding that the judgment below must be vacated. I dissent, however, from the majority's strong and gratuitous suggestion that the Mississippi Supreme Court nevertheless may "salvage" Clemons' death sentence by performing its own weighing of aggravating and mitigating circumstances.

I

In *Godfrey* v. *Georgia*, 446 U. S. 420 (1980), this Court considered Georgia's "outrageously or wantonly vile, horrible or inhuman" aggravating circumstance. The plurality stated: "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.*, at 428–429. In *Maynard* v. *Cartwright*, 486 U. S. 356 (1988), we noted that "the language of the Oklahoma aggravating circumstance at issue—'especially heinous, atrocious, or cruel'—gave no more guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in *Godfrey*." *Id.*, at 363–364. The evil of a "catchall" aggravating circumstance such as this one is that it provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." *Godfrey* v. *Georgia*, 446 U. S., at 433 (plurality opinion). It therefore is apparent that Mississippi's "especially heinous, atrocious or cruel" aggravating circumstance is invalid unless the State has established some method by which its application can be limited meaningfully.

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[1] Although the Court nowhere expressly states that the aggravating factor, as communicated to the jury, is unconstitutional, that assumption necessarily is implicit in the Court's opinion. If no trial-level error occurred, there would be no need for the Court to inquire whether the Mississippi Supreme Court had articulated a permissible basis for curing the error; nor would a remand be necessary.

In the present case, the Mississippi Supreme Court sought to distinguish *Maynard* by pointing to a "limiting construction" adopted in *Coleman* v. *State*, 378 So. 2d 640 (Miss. 1979): "'"What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim."'" 535 So. 2d 1354, 1363 (1988) (quoting *Coleman*, 378 So. 2d, at 648, which in turn quoted *Spinkellink* v. *Wainwright*, 578 F. 2d 582, 611 (CA5 1978), cert. denied, 440 U. S. 976 (1979)). When one reads the *Coleman* opinion, however, it is apparent that it did not establish a "limiting construction" at all. The Mississippi court, at the page cited, further quoted:

> "'Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended.'" (Emphasis deleted.)

The *Coleman* court argued, in other words, that a sentencing jury could be expected to interpret the words "especially heinous, atrocious or cruel" as signifying "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." *Coleman* did not seek to clarify this aggravating circumstance. Rather, the court argued that no clarification was necessary[2]—a proposition emphatically rejected in *Maynard.* The *Coleman* definition was never intended—and has proved to be utterly unable—to provide guidance to the sentencing jury.

In this case, as in the vast majority of Mississippi cases in which this aggravating circumstance has been submitted, the jury was given no guidance beyond the statutory language. The Mississippi Supreme Court frequently has held that the phrase "especially heinous, atrocious or cruel" is readily comprehensible to the average juror and that no further instruction is necessary.[3] On one occasion the court suggested that the better course is to give a clarifying instruction, but it shortly made it clear that a trial judge's failure to do so is not reversible error.[4] In another case the court went so far as to discourage the use of a clarifying instruction.[5] The Mississippi Supreme Court even has upheld a trial judge's refusal to give an instruction, requested by the defense, that tracked the language of *Coleman.*[6] In short, it is no accident and no anomaly that the jury in petitioner's case—like the Oklahoma jury in *Maynard*[7]—was left to its own devices in applying the "especially heinous, atrocious or cruel" aggravating circumstance.[8]

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[2] The *Coleman* court also quoted its earlier statement in *Washington* v. *State*, 361 So. 2d 61, 65 (1978), cert. denied, 441 U. S. 916 (1979): "'In our opinion the words "especially heinous, atrocious or cruel" are not confusing nor likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words.'" 378 So. 2d, at 648.

[3] See, *e. g., Jones* v. *State*, 517 So. 2d 1295, 1301 (1987) ("This Court has never found that such an instruction is constitutionally required, nor has any case appearing here been reversed for failure to grant the instruction defining 'heinous, atrocious and cruel.' We have held that the terms are not likely to be misunderstood and that they require no further definition"), vacated and remanded, 487 U. S. 1230 (1988); *Jordan* v. *State*, 464 So. 2d 475, 478 (1985), vacated and remanded, 476 U. S. 1101 (1986); *Booker* v. *State*, 449 So. 2d 209, 220–221 (1984), vacated and remanded, 472 U. S. 1023 (1985); *Irving* v. *State*, 441 So. 2d 846, 849 (1983), cert. denied, 470 U. S. 1059 (1985); *Edwards* v. *State*, 441 So. 2d 84, 90 (1983); *Tokman* v. *State*, 435 So. 2d 664, 669–670 (1983), cert. denied, 467 U. S. 1256 (1984).

[4] In *Mhoon* v. *State*, 464 So. 2d 77 (1985), the court vacated the defendant's sentence on other grounds but stated in dictum: "Absent a requirement that the jury be instructed as to the specific meaning of 'especially heinous, atrocious or cruel' the mandate of *Godfrey* is not met." *Id.*, at 85. The court indicated that on remand the trial judge should give a limiting instruction. *Ibid.* The suggestion that the Mississippi Supreme Court would require a clarifying instruction was short lived, however. In *Wiley*

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v. *State*, 484 So. 2d 339, 353–354, cert. denied, 479 U. S. 906 (1986), the court cited *Mhoon* but affirmed the jury's finding of the "especially heinous, atrocious or cruel" aggravating factor despite the fact that no limiting instruction was given.

[5] See *Jones* v. *State*, 517 So. 2d, at 1301 ("This Court has condemned the efforts of lower courts to define 'reasonable doubt' or 'malice.' As stated, such terms should be left to the jury for its understanding and for applying its knowledge and experience. We think the same reasoning and logic applies [to the phrase 'especially heinous, atrocious or cruel']").

[6] In *Evans* v. *State*, 422 So. 2d 737 (1982), cert. denied, 461 U. S. 939 (1983), the trial judge refused the following instruction requested by the defense: " 'The Court instructs the Jury that the terms heinous, atrocious, and cruel are deemed to include those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies in that it involved the conscienceless or pitiless crime which is unnecessarily torturous to the victim. If you find from the evidence that the victim died a quick death without unnecessary pain and torture, then, though the crime is murder, it is not to be considered as especially heinous, atrocious or cruel.' " 422 So. 2d, at 745. The Supreme Court of Mississippi held that "under the facts of the case sub judice and under the Mississippi statute, [this instruction] was too restrictive and its refusal does not constitute reversible error notwithstanding *Godfrey* v. *Georgia.*" *Ibid.*

[7] In fact, the jury in petitioner's case received even less guidance than did the Oklahoma jury in *Maynard.* The Oklahoma jury was instructed that " 'the term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.' " See *Cartwright* v. *Maynard*, 822 F. 2d 1477, 1488 (CA10 1987).

[8] Since its decision in the present case, the Supreme Court of Mississippi now apparently recognizes that the "especially heinous, atrocious or cruel"

Nor has appellate review by the Mississippi Supreme Court served to limit the application of this aggravating circumstance to those murders that are "unnecessarily torturous to the victim." To begin with, the court has disavowed the *Coleman* definition in sustaining capital sentences. See *Irving* v. *State*, 441 So. 2d 846, 850 (1983) (aggravating circumstance held to be supported by the record even though victim died instantly: "While the great majority of death penalty cases affirmed by this Court involve some type of physical and/or mental torture to the victim, we have never specifically held that a finding of [this aggravating factor] must be supported by evidence of prolonged suffering"), cert. denied, 470 U. S. 1059 (1985).[9] In the vast majority of Mississippi cases in which a capital sentence has been imposed, the jury has concluded that the murder was "especially heinous, atrocious or cruel."[10] The Mississippi Supreme Court *never* has found that this aggravating circumstance was unsupported by the record. Often the aggravating circumstance

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aggravating circumstance cannot constitutionally be submitted to the jury without a limiting instruction. See *Johnson* v. *State*, 547 So. 2d 59, 60 (1989); *Pinkney* v. *State*, 538 So. 2d 329, 355 (1988).

[9] See also *Booker* v. *State*, 449 So. 2d, at 209, 216 (photographs of gunshot victims were probative of "especially heinous, atrocious or cruel" aggravating circumstance; also probative was the fact that the defendant "could just have easily knocked Mr. Martin in the head and spared his life, but chose instead to kill him"). Cf. *Godfrey* v. *Georgia*, 446 U. S. 420, 433, n. 16 (1980) ("[I]t is constitutionally irrelevant that the petitioner used a shotgun instead of a rifle as the murder weapon, resulting in a gruesome spectacle in his mother-in-law's trailer. An interpretation of [the aggravating circumstance] so as to include all murders resulting in gruesome scenes would be totally irrational") (plurality opinion).

[10] See *Wiley* v. *State*, 484 So. 2d, at 359. ("The average citizens who have served on our capital sentencing juries demonstrably have misunderstood the statutory language in that, in the aggregate, they have ignored the law and acted upon the layman's intuitive notion that all murders are heinous, atrocious or cruel. There is no evidence that this aggravating circumstance has in any way served to narrow or guide rationally the jury's sentencing discretion") (Robertson, J., concurring).

has been upheld despite the fact that the victim died instantly or within a very brief period of time.[11] In some of these cases, the Mississippi Supreme Court has stated only that the aggravating circumstance was supported by the record, or that the question was for the jury;[12] on other occasions the court has justified its decision by noting that the murder was as heinous, atrocious, or cruel as in previous cases where death was also instantaneous.[13] In short, the "limiting construction" announced in *Coleman* has not prevented Mississippi juries from acting upon a belief that *every* murder is especially heinous, atrocious, or cruel.[14] I therefore agree that petitioner Clemons' sentencing jury relied in part on an invalid aggravating factor, and I concur in the Court's decision to vacate the judgment of the Supreme Court of Mississippi.

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[11] See, *e. g.*, *Lockett* v. *State*, 517 So. 2d 1317 (1987), cert. denied, 487 U. S. 1210 (1988); *Jones* v. *State*, *supra; Wiley* v. *State*, *supra; Booker* v. *State*, *supra; Irving* v. *State*, 441 So. 2d 846 (1983); *Gilliard* v. *State*, 428 So. 2d 576, cert. denied, 464 U. S. 867 (1983); *Evans* v. *State*, *supra; Johnson* v. *State*, 416 So. 2d 383 (1982); *Edwards* v. *State*, 441 So. 2d 84 (1983); *Caldwell* v. *State*, 443 So. 2d 806 (1983), rev'd on other grounds, 472 U. S. 320 (1985).

[12] See, *e. g.*, *Edwards* v. *State*, 441 So. 2d, at 92; *Caldwell* v. *State*, 443 So. 2d, at 814; *Evans* v. *State*, 422 So. 2d, at 743.

[13] See, *e. g.*, *Lockett* v. *State*, 517 So. 2d, at 1337 ("These facts seem closely analogous to those which did not require reversal in *[Jones* and *Wiley]*"); *Wiley* v. *State*, 484 So. 2d, at 354 ("The facts of the present case are similar to the facts in *Edwards*"); *Irving* v. *State*, 441 So. 2d, at 850 ("[T]he present case depicts a killing no less heinous than those in *Edwards* and *Gilliard*").

[14] In *Johnson* v. *State*, 477 So. 2d 196 (1985), cert. denied, 476 U. S. 1109 (1986), the court stated: "The very word 'murder' embraces within its meaning cruelty, brutality and an evil intent carried to the ultimate in harm: death. It is redundant to characterize a murder as cruel, brutal or malicious." 477 So. 2d, at 217. Two pages later, *id.*, at 219, the court affirmed the jury's finding of the "especially heinous, atrocious or cruel" aggravating circumstance; the court offered no analysis, but simply cited its prior opinions in *Booker*, *Caldwell*, and *Irving*.

II

As stated above, however, I dissent from the majority's gratuitous suggestion that on remand the Mississippi Supreme Court itself may reweigh aggravating and mitigating circumstances and thereby salvage petitioner's death sentence. That portion of the Court's discussion is a pure and simple advisory opinion, something I thought this Court avoided and was disinclined to issue. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983); *Bayard* v. *Lombard*, 9 How. 530, 548–549 (1850). The majority recognizes, as it must, that the Mississippi Supreme Court has given no clear indication that it intends to reweigh or that under state law it has the power to do so. The Court's determination that reweighing is constitutional has no bearing upon our conclusion, which is to vacate the Mississippi judgment and remand the case for further proceedings in the state courts. Rather than awaiting, and then reviewing, the decisions of other tribunals, the Court today assumes that its role is to offer helpful suggestions to state courts seeking to expedite the capital sentencing process. Of course the Court's discussion of reweighing may have an effect on the form that the state proceedings will take. But the impropriety of an advisory opinion is not eliminated by the possibility that the state court will act upon the advice.

In my view, the majority's discussion of the reweighing issue is sadly flawed. If a jury's verdict rests in part upon a constitutionally impermissible aggravating factor, and the State's appellate court upholds the death sentence based upon its own reweighing of legitimate aggravating and mitigating circumstances, the appellate court, in any real sense, has not approved or affirmed the verdict of the jury. Rather, the reviewing court in that situation has assumed for itself the role of sentencer. The logical implication of the majority's approach is that no trial-level sentencing procedure need be conducted at all. Instead, the record of a capital trial (including a sentencing hearing conducted before a court reporter) might as well be shipped to the appellate court, which then would determine the appropriate sentence in the first instance.

The Court's approval of appellate sentencing finds little basis in our precedents. The majority relies principally on three of this Court's capital sentencing decisions. Two of these cases seem to me to be inapposite; the third, while lending frail support to the majority's conclusion, is distinguishable in its really crucial aspects.

Cabana v. *Bullock,* 474 U. S. 376 (1986), is the only case that possibly provides theoretical support for the majority's position. In the end, however, I believe that the Court's opinion today goes significantly beyond the result reached in *Bullock.* In that case a bare majority of the Court held that the finding required by *Enmund* v. *Florida,* 458 U. S. 782 (1982)—that the defendant killed, attempted to kill, or intended that a killing occur—could be made in the first instance by a state supreme court, and that the state court's finding would be entitled to a presumption of correctness on federal habeas review. The Court noted, however, that there are significant limitations on the appellate court's ability to make the findings required by *Enmund:*

> "There might be instances, however, in which the presumption [of correctness] would not apply to appellate factfinding regarding the *Enmund* criteria because appellate factfinding procedures were not 'adequate,' see 28 U. S. C. § 2254(d)(2). For example, the question whether the defendant killed, attempted to kill, or intended to kill might in a given case turn on credibility determinations that could not be accurately made by an appellate court on the basis of a paper record . . . . The possibility that such cases falling within the § 2254(d)(2) exception may exist, however, does not excuse the habeas court of its obligation to examine the entire state process to determine whether the *Enmund* findings

> have been made, for it is by no means apparent that appellate factfinding will always be inadequate. For example, in some cases it may be possible to determine the *Enmund* issue adversely to the defendant even if credibility issues and other ambiguities in the record are resolved in his or her favor." 474 U. S., at 388, n. 5.

Bullock, it seems to me, stands only for the proposition that an appellate court may make *Enmund* findings based on a "summary judgment" standard, viewing the evidence in the light most favorable to the defendant. This Court in that case did not hold that an appellate court may make *Enmund* findings that turn on disputed issues of fact. And it certainly did not hold that an appellate court may assess the weight of mitigating evidence without observing the defendant and his witnesses.

The Court's reliance on *Wainwright* v. *Goode*, 464 U. S. 78 (1983), is misplaced. The trial error alleged in *Goode*—reliance on a "future dangerousness" aggravating circumstance—was an error of state law only. This Court has said that the Constitution does not forbid consideration of future dangerousness as a factor in capital sentencing, see *Jurek* v. *Texas*, 428 U. S. 262 (1976); insofar as the Eighth Amendment is concerned, Goode had received an error-free sentencing procedure at the trial level. The Florida Supreme Court's independent reweighing of aggravating and mitigating factors, this Court held, was sufficient to ensure that state law was not applied in so haphazard a fashion as to produce "an arbitrary or freakish sentence forbidden by the Eighth Amendment." 464 U. S., at 87. *Goode* supports only the unremarkable proposition that errors of state law are not ordinarily the concern of federal courts, see *id.*, at 86 (citing *Barclay* v. *Florida*, 463 U. S. 939, 957–958 (1983) (plurality opinion)), and that state appellate courts are given broad latitude in their review of state-law claims. The decision does not support the majority's conclusion that a state supreme court itself may impose a capital sentence in a case where the trial-level sentencing procedure failed to satisfy federal constitutional requirements.

The Court also states that in *Spaziano* v. *Florida,* 468 U. S. 447 (1984), "we upheld the Florida death penalty scheme permitting a trial judge to override a jury's recommendation of life even though there were no written jury findings." *Ante,* at 750. But our conclusion in *Spaziano*—that evidence relevant to the capital sentencing decision can be adequately assessed by a trial judge *who has witnessed the testimony*—is irrelevant to the question whether such an assessment can be made on the basis of a cold record. The majority's immediately following and conclusory assertion that "[a]n appellate court also is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written jury findings" simply emerges from nowhere.

Indeed, the Court's reliance on *Spaziano*—reflecting an implicit assumption that trial and appellate judges somehow are interchangeable—is symptomatic of the confusion that seems to me to characterize the majority opinion. To support its conclusion that appellate reweighing is permissible, the majority notes: "It is a routine task of appellate courts to decide whether the evidence supports a jury verdict and in capital cases in 'weighing' States, to consider whether the evidence is such that the sentencer could have arrived at the death sentence that was imposed. . . . [A] similar process of weighing aggravating and mitigating evidence is involved in an appellate court's proportionality review." *Ante,* at 748–749. The majority thus equates the reviewing function of an appellate court with the trial judge's initial assessment of the evidence. In fact, however, both this Court and the Supreme Court of Mississippi repeatedly have emphasized that appellate courts are institutionally incapable of fulfilling the distinct functions performed by trial judges and juries.[15]

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[15] I also am unconvinced by the majority's reliance on the principle that "meaningful appellate review of death sentences promotes reliability and consistency." *Ante,* at 749. As to consistency: the State's interest in

The Supreme Court of Mississippi itself has said that "even if we wanted to be fact finders, our capacity for such is limited in that we have only a cold, printed record to review. The trial judge who hears the witnesses live, observes their demeanor and in general smells the smoke of the battle is by his very position far better equipped to make findings of fact which will have the reliability that we need and desire." *Gavin* v. *State*, 473 So. 2d 952, 955 (1985). See also, *e. g.*, *Cook* v. *State*, 467 So. 2d 203, 204 (Miss. 1985) ("[W]e have no choice but to accord great respect and deference to verdicts by properly instructed juries, for the chances of error and injustice in any determination we might make would be infinitely greater than is the case where those findings are made by an impartial jury drawn from a fair cross-section of the community"); *Hall* v. *State*, 427 So. 2d 957, 960, n. 3 (Miss. 1983) ("We emphasize that we are not here making findings of fact on conflicting evidence. Appellate courts do not do this"). In the capital context that court has stressed: "Under our law the jury is the sole player in the judicial process who may vote to send an accused to die. They alone make that determination and all review is then conducted with a presumption of its correctness." *Wiley* v. *State*, 449 So. 2d 756, 762 (1984). See also *Leatherwood* v. *State*, 539 So. 2d 1378, 1389 (Miss. 1989) ("It matters not, however, whether the record is now complete, for the [evidence] must first be presented to the circuit court jury. The circuit court

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ensuring that uniform standards apply in capital cases does not require that the state supreme court impose the sentence in the first instance. That goal could equally be served by rigorous proportionality review. As to reliability: the principal value of appellate review is that "two heads are better than one"; the reviewing court may spot the errors made by the initial sentencer. But when the state supreme court *is* the initial sentencer, there is no appellate review, except, possibly, in the rare case when this Court grants certiorari. Our recognition that trial-level sentencing plus appellate review is better than trial-level sentencing alone does not support the Court's conclusion that appellate sentencing itself is sufficient to satisfy constitutional requirements.

jury sits as factfinder and sentencer, and it is that body, not this Court, which should make all of the credibility determinations that go along with the exercise of that duty"); *White* v. *State*, 532 So. 2d 1207, 1220 (Miss. 1988) ("As in other cases, our scope of review is limited. We must view the evidence and all reasonable inferences which may be drawn therefrom in the light most consistent with the verdict. We have no authority to disturb the verdict short of a conclusion on our part that upon the evidence, taken in the light most favorable to the verdict, no rational trier of fact could have found the fact at issue beyond a reasonable doubt"); *Williams* v. *State*, 445 So. 2d 798, 811 (Miss. 1984) (review of jury's finding of aggravating circumstances involves "nothing more than the familiar test we apply when a defendant argues here that the trial judge should have entered a judgment of acquittal notwithstanding the verdict of the jury"), cert. denied, 469 U. S. 1117 (1985).[16]

As noted earlier, the Mississippi Supreme Court never has held that the evidence failed to support a jury's finding that a particular murder was "especially heinous, atrocious or cruel." The court is required to undertake a proportionality review whenever it affirms a sentence of death, but on only one occasion has a capital sentence been invalidated solely on the ground that it was disproportionate to the offense.[17] These facts do not prove that the Supreme Court of Mississippi has failed to fulfill its proper function. The facts *do* show, however, that its function has been that of an *appellate* court, reviewing the decisions of sentencing juries with a heavy measure of deference. The Mississippi Supreme Court has emphasized repeatedly that it lacks both the authority and the institutional competence to determine the appropriate sentence as an initial matter. Yet when deference to the jury's role as the sentencing body would require that a new sentencing hearing be convened, this Court's majority of today strongly encourages the state court to adopt, instead, a radically different conception of its institutional role.

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[16] Indeed, in another section of its opinion in the case before us, the Supreme Court of Mississippi rejected petitioner's claim that the evidence failed to support the jury's sentence. The court stated: "The jury is the factfinder and, in the present case, found that the aggravating circumstances outweighed the mitigating circumstances presented by Clemons. This Court is bound by that finding of the jury." 535 So. 2d 1354, 1361 (1988).

[17] See *Coleman* v. *State*, 378 So. 2d 640 (1979). See also *Edwards* v. *State*, 441 So. 2d 84 (Miss. 1983); *Bullock* v. *State*, 525 So. 2d 764 (Miss. 1987) (on remand from this Court's decision in *Cabana* v. *Bullock*, 474 U. S. 376 (1986)). In *Edwards* and *Bullock*, three of the Mississippi Supreme Court's nine justices concluded that a sentence of death would be disproportionate to the defendant's crime. Since other justices in each

Like the Mississippi Supreme Court, this Court, too, has emphasized that trial and appellate tribunals respectively perform distinct functions. In explaining the requirement that courts of appeals must defer to district court findings of fact unless these findings are clearly erroneous, it has noted that "only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson* v. *Bessemer City*, 470 U. S. 564, 575 (1985).[18] The Federal

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case believed on other grounds that the case should be remanded for a new sentencing hearing, there was no majority in favor of any particular disposition and the defendants were sentenced to life imprisonment. In *Bullock*, the three justices who believed the death sentence to be disproportionate based their conclusion on the fact that "when you review all of the other capital cases decided since [1980], no capital defendant has had a death sentence affirmed in this state where the sole finding was that he contemplated lethal force." 525 So. 2d, at 770. It therefore bears noting that Chandler Clemons' jury found only that Clemons contemplated that lethal force would be used—not that he killed or attempted to kill.

[18] See *Boyd* v. *Boyd*, 252 N. Y. 422, 429, 169 N. E. 632, 634 (1930) ("Face to face with living witnesses the original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong? We never saw the witnesses . . . . To the sophistication

Rules, of course, are not of constitutional stature; the States are not required to mimic the federal system in their allocation of responsibilities between trial and appellate courts. But, given the heightened concern for reliability when a sentence of death is imposed,[19] I find inexplicable the majority's willingness in a capital case to countenance the resolution of disputed factual issues by means of a procedure that this Court has deemed insufficiently reliable even for the adjudication of a civil lawsuit.

In a variety of contexts, moreover, this Court has attached *constitutional* significance to an individual's interest in presenting his case directly to the finder of fact. In *Rock* v. *Arkansas*, 483 U. S. 44, 51, n. 8 (1987), we noted that "there [is] no longer any doubt that the right to be heard, which is so essential to due process in an adversary system of adjudication, [can] be vindicated only by affording a defendant an opportunity to testify before the factfinder." We have recognized that the Confrontation Clause serves to afford a criminal defendant the privilege "of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Mattox* v. *United States*, 156 U. S. 237, 242–243 (1895). Outside the criminal context, the Court has held that termination of benefits under the Aid to Families with Dependent Children program must be preceded by a hearing, since "[p]articularly where credibility and veracity are at

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and sagacity of the trial judge the law confides the duty of appraisal . . . . His was the opportunity, the responsibility and the power to decide"). See also *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 339 (1952) (quoting *Boyd*); *Wainwright* v. *Witt*, 469 U. S. 412, 434 (1985) (same); *Marshall* v. *Lonberger*, 459 U. S. 422, 434 (1983) (same).

[19] See, *e. g.*, *California* v. *Ramos*, 463 U. S. 992, 998–999 (1983) ("The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination").

issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." *Goldberg* v. *Kelly*, 397 U. S. 254, 269 (1970). See also *Morrissey* v. *Brewer*, 408 U. S. 471, 489 (1972) (when parole is revoked, parolee is constitutionally entitled to an "opportunity to be heard in person"). It stands the Eighth Amendment on its head to suggest that these concerns somehow become less pressing when a sentence of death is imposed.[20]

In part, therefore, the impropriety of appellate sentencing rests on the appellate court's diminished ability to act as a factfinder. But I think there is more to it than that. An appellate court is ill suited to undertake the task of capital sentencing, not simply because of its general deficiencies as a factfinder, or because the costs of erroneous factfinding are so high, but also because the capital sentencing decision by its very nature is peculiarly likely to turn on considerations that cannot adequately be conveyed through the medium of a written record. In *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985), this Court emphasized that

> "an appellate court, unlike a capital sentencing jury, is wholly ill-suited to evaluate the appropriateness of death in the first instance. Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any argument for consideration of what this Court has termed '[those]

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[20] For essentially the same reasons, I think it would be inappropriate for the Mississippi Supreme Court to determine, on the basis of a paper record, whether this murder fits within the *Coleman* definition of "especially heinous, atrocious or cruel." Moreover, even if such a determination could be made, the inquiry would not be at an end. The possibility would remain that the jury, in balancing the aggravating circumstances against the mitigating evidence, had attached weight to factors (such as the personal characteristics of the victim or the wickedness of murder generally) that do not fall within the *Coleman* definition.

> compassionate or mitigating factors stemming from the diverse frailties of humankind.' *Woodson* [v. *North Carolina,* 428 U. S. 280, 304 (1976)]. When we held that a defendant has a constitutional right to the consideration of such factors [citing *Eddings* v. *Oklahoma,* 455 U. S. 104 (1982), and *Lockett* v. *Ohio,* 438 U. S. 586 (1978)], we clearly envisioned that that consideration would occur among sentencers who were present to hear the evidence and arguments and see the witnesses." *Id.*, at 330–331.[21]

The petitioner in this case, for example, argued that his remorse for the crime constituted a mitigating factor. It would verge on the surrealistic to suggest that Chandler Clemons' right to present that contention would be adequately protected by an appellate court's consideration of the written transcript of his testimony. More than any other decision known to our law, the decision whether to impose the death penalty involves an assessment of the defendant himself, not simply a determination as to the facts surrounding a particular event. And an adequate assessment of the defendant—a procedure which recognizes the "need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual," *Lockett* v. *Ohio,* 438 U. S. 586, 605 (1978) (plurality opinion)—surely requires a sentencer who confronts him in the flesh. I therefore conclude that a capital defendant's right to present mitigating evidence cannot be fully realized if that evidence can be submitted only through the medium of a paper record. I also believe that, if a sentence of death is to be imposed, it should be pronounced by a decisionmaker who will look upon the face of the defendant as he renders judgment. The bloodless alternative approved by the majority conveniently may streamline the process of capital sentencing, but at a cost that seems to me to be intolerable.

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[21] The majority opinion today includes a single, perfunctory reference to *Caldwell,* citing it for the bland proposition that "appellate courts may face certain difficulties in determining sentencing questions in the first instance." *Ante,* at 754. The majority does not attempt to reconcile its decision with *Caldwell's* analysis of the institutional limitations of appellate courts.

III

By now it is settled law that "the penalty of death is qualitatively different" from any other sentence, *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), and that "this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed," *Lockett* v. *Ohio*, 438 U. S., at 604 (plurality opinion). Our Eighth Amendment jurisprudence reflects the conviction that state procedures that satisfy constitutional requirements in the general run of criminal prosecutions may nevertheless be inadequate when a defendant's life is at stake. Against this backdrop, I find extraordinary the majority's eagerness to approve a capital sentencing procedure that the Mississippi Supreme Court has shown no clear inclination to adopt,[22] that appears to have no analogue

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[22] The Mississippi Supreme Court's decision in *Johnson* v. *State*, 511 So. 2d 1333 (1987), rev'd, 486 U. S. 578 (1988), on remand, 547 So. 2d 59 (1989), is instructive. The jury had relied on three aggravating circumstances. One of these was invalidated by this Court; on remand, the Mississippi Supreme Court indicated that the "especially heinous, atrocious or cruel" aggravating circumstance was also invalid in light of *Maynard*. 547 So. 2d, at 60. The court did not seek to weigh the remaining aggravating factor against the mitigating evidence, nor did it attempt to apply its "limiting construction" of the "especially heinous, atrocious or cruel" aggravating circumstance. Rather, it remanded for a new sentencing hearing on the ground that "[w]e cannot know what the sentence of that jury would have been in the absence of this aggravating circumstance." *Id.*, at 61.

The Court argues that reweighing in this case would not be inconsistent with the result in *Johnson*, since Johnson's jury relied on *two* invalid aggravating factors and was exposed to inadmissible evidence. See *ante*, at 759, n. 5. These distinctions would surely affect the Mississippi Supreme Court's ability to review for *harmless error:* the more deeply tainted the jury's verdict, the more difficult it is to say with assurance what the verdict would have been had the taint been eliminated. But the Mississippi in other areas of Mississippi law, and that flies in the face of this Court's prior warnings concerning the institutional limitations of appellate courts.[23]

Supreme Court's ability to reweigh valid aggravating factors against mitigating evidence (without consideration of improperly admitted evidence) should not be affected by the number of invalid aggravating circumstances originally submitted.

[23] I am less troubled by the majority's suggestion that harmless-error analysis might sometimes be applicable when an aggravating circumstance found by the jury is later determined to be invalid. The Court has held that harmless-error principles apply to capital sentencing. *Satterwhite* v. *Texas*, 486 U. S. 249 (1988). Unlike appellate reweighing, harmless-error analysis reflects deference to the trial-level sentencer, and review for harmless error is almost a routine undertaking of appellate courts. In *Blystone* v. *Pennsylvania*, *ante*, p. 299, this Court held that a State may require the death penalty when the sentencer finds one or more aggravating circumstances and no mitigating factors. If a jury operating under such a statute found two or more aggravating circumstances and no mitigating factors, and one of the aggravating circumstances was invalidated on appeal, I must now agree that the jury's reliance on the improper factor would be harmless beyond a reasonable doubt.

It would be the rare case, however, in which it could truly be said beyond a reasonable doubt that a sentencing decision would have been the same in the absence of an invalid aggravating circumstance. Harmless-error analysis would be especially problematic (if not impossible) in Mississippi, where the jury is not required to make written findings concerning mitigating circumstances, and where the jury need not impose a death sentence even if aggravating factors outweigh those in mitigation. It is clear to me that the error in the present case could not be deemed harmless beyond a reasonable doubt. As the majority notes, *ante*, at 753–754, the prosecutor's emphasis on the "especially heinous, atrocious or cruel" aggravating circumstance makes it difficult to say with any assurance that the jury's sentence would have been the same had "robbery for pecuniary gain" been the only aggravating factor. Nor could it be said beyond a reasonable doubt that the jury would have considered the murder to be "especially heinous, atrocious or cruel" had it been informed of the Mississippi Supreme Court's "limiting construction." Though the victim did not die instantaneously, there is no evidence of prolonged physical suffering; there is no evidence that petitioner intended the victim to suffer; and there is no finding that petitioner was the triggerman. In arguing for this aggravating circumstance, the prosecutor relied in part on the physical

The one consolation, in my view, lies in the possibility that the Supreme Court of Mississippi will decline the invitation that this Court proffers today. The majority, as I see it, has abdicated its responsibility to enforce federal constitutional norms. That failure, however, cannot absolve the Mississippi Supreme Court of its duty to apply state procedural rules in a fair and consistent manner. The Supreme Court of Mississippi repeatedly has stated that it cannot and will not fulfill the role that the majority suggests for it today. Despite this Court's decision, it is still the responsibility of the Mississippi Supreme Court to ensure that "[t]here will be no short cuts to the execution chamber." *Pinkton* v. *State*, 481 So. 2d 306, 310 (Miss. 1985).

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pain suffered by the victim, but also stressed the victim's youth and industriousness—characteristics that have nothing to do with the *Coleman* definition. See 7 Record 1192–1193. (In another portion of his closing argument, the prosecutor emphasized the admonition in Numbers 35:9–34 that "[t]he murderer shall surely be put to death." 7 Record 1196–1198.) I do not believe that it can be said with any assurance that the jury would have found this aggravating factor had it been properly instructed.

NATIONAL LABOR RELATIONS BOARD *v.* CURTIN MATHESON SCIENTIFIC, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 88-1685. Argued December 4, 1989—Decided April 17, 1990

The National Labor Relations Act's irrebuttable presumption of majority support for a certified collective-bargaining agent becomes rebuttable after one year. According to the National Labor Relations Board, an employer may rebut the presumption by showing, *inter alia*, that it had a "good-faith" doubt, founded on a sufficient objective basis, of the union's majority support. *Station KKHI*, 284 N. L. R. B. 1339. Although the Board has changed its position over the years as to whether, in determining the good-faith doubt question, it should apply a presumption that striker replacements either oppose the union or support it in the same ratio as the strikers they replaced, the Board presently follows a no-presumption approach and determines replacements' union sentiments on a case-by-case basis. *Id.*, at 1344–1345. Applying this approach in the present case, the Board concluded that respondent employer's evidence of its striker replacements' union sentiments was insufficient to rebut the presumption of the union's majority support. Among other things, the Board therefore held that respondent had violated the Act by withdrawing recognition from the union and ordered respondent to bargain upon the union's request. In refusing to enforce the Board's order, the Court of Appeals held that the Board *must* presume that striker replacements oppose the union, and that, accordingly, respondent was justified in doubting the union's majority support.

Held: The Board acted within its discretion in refusing to adopt a presumption of replacement opposition to the union. Pp. 786–796.

(a) Since Congress has entrusted the Board with the primary responsibility for developing and applying national labor policy, a Board rule is entitled to considerable deference so long as it is rational and consistent with the Act, even if it represents a departure from the Board's prior policy. See, *e. g.*, *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 265–266. Pp. 786–787.

(b) The Board's refusal to adopt an antiunion presumption is rational as an empirical matter. Although replacements often may not favor the incumbent union, the Board reasonably concluded, in light of its considerable experience in addressing these issues, that the probability of replacement opposition is insufficient to justify an antiunion presumption, since the circumstances surrounding each strike and replacements' reasons for crossing a picket line may vary greatly. For example, a replacement who otherwise supports the union and desires its representation may be forced by economic concerns to work for a struck employer. He may also want such representation even though he disagrees with the purpose or strategy of, and refuses to support, the particular strike. Respondent's contention that the Board's position is irrational because the interests of strikers and replacements are diametrically opposed and because unions inevitably side with strikers is unpersuasive. Unions do not invariably demand displacement of all replacements, and the extent to which they do so will depend on the extent of their bargaining power, which will in turn vary greatly from strike to strike. If the union's bargaining position is weak, many of the replacements justifiably may not fear that they will lose their jobs at the end of the strike and may still want the union's representation thereafter. Moreover, even if the interests of strikers and replacements conflict *during* the strike, those interests may converge *after* job rights have been settled; replacements surely are capable of looking past the strike in considering whether they want representation. Thus, the Board's approach is not irreconcilable with its position in *Service Electric Co.*, 281 N. L. R. B. 633, 641, and *Leveld Wholesale, Inc.*, 218 N. L. R. B. 1344, 1350, that an employer has no duty to bargain with a striking union over replacements' employment terms. Furthermore, the Board has not deemed picket-line violence or a union's demands that replacements be terminated irrelevant to its evaluation of their union sentiments. Cf. *Stormor, Inc.*, 268 N. L. R. B. 860, 866–867; *IT Services*, 263 N. L. R. B. 1183, 1185–1188. In both *Station KKHI*, *supra*, and this case, the Board noted that the picket line was peaceful, and in neither case did the employer present evidence that the union was actively negotiating for the ouster of replacements. Pp. 788–793.

(c) In light of the considerable deference accorded the Board's rules, its refusal to adopt an antiunion presumption is consistent with the Act's overriding policy of achieving industrial peace. The Board's approach furthers this policy by promoting stability in the collective-bargaining process. It was reasonable for it to conclude that the antiunion presumption could allow an employer to eliminate the union entirely merely by hiring a sufficient number of replacements and thereby to avoid good-faith bargaining over a strike settlement. It was also reasonable for the Board to decide that the antiunion presumption might chill employees' exercise of their statutory right to engage in concerted activity, including the right to strike, by confronting them not only with the prospect of being permanently replaced, but also with the greater risk that they would lose their bargaining representative, thereby diminishing their chance of obtaining reinstatement through a strike settlement. Pp. 794–796.

859 F. 2d 362, reversed and remanded.

MARSHALL, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and BRENNAN, WHITE, and STEVENS, JJ., joined. REHNQUIST, C. J., filed a concurring opinion, *post*, p. 797. BLACKMUN, J., filed a dissenting opinion, *post*, p. 798. SCALIA, J., filed a dissenting opinion, in which O'CONNOR and KENNEDY, JJ., joined, *post*, p. 801.

Deputy Solicitor General Shapiro argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Lawrence S. Robbins*, *Joseph E. DeSio*, *Robert E. Allen*, *Norton J. Come*, *Linda Sher*, and *Peter Winkler*.

James V. Carroll III argued the cause for respondent. With him on the brief were *Mark Schwartz*, *John B. Thomas*, and *Holly H. Williamson*.*

JUSTICE MARSHALL delivered the opinion of the Court.

This case presents the question whether the National Labor Relations Board (NLRB or Board), in evaluating an employer's claim that it had a reasonable basis for doubting a union's majority support, *must* presume that striker replacements oppose the union. We hold that the Board acted within its discretion in refusing to adopt a presumption of replacement opposition to the union and therefore reverse the judgment of the Court of Appeals.

I

Upon certification by the NLRB as the exclusive bargaining agent for a unit of employees, a union enjoys an irrebutta-

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**Marsha S. Berzon*, *Walter Kamiat*, and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations as *amicus curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the Chamber of Commerce of the United States by *John S. Irving* and *Stephen A. Bokat;* and for the Manville Corporation by *William J. Rodgers*.

ble presumption of majority support for one year. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 37 (1987). During that time, an employer's refusal to bargain with the union is *per se* an unfair labor practice under §§ 8(a)(1) and 8(a)(5) of the National Labor Relations Act (NLRA), 49 Stat. 452, as amended, 29 U. S. C. §§ 158(a)(1), 158(a)(5).[1] See *Celanese Corp. of America*, 95 N. L. R. B. 664, 672 (1951); R. Gorman, Labor Law, Unionization and Collective Bargaining 109 (1976). After the first year, the presumption continues but is rebuttable. *Fall River*, *supra*, at 38. Under the Board's longstanding approach, an employer may rebut that presumption by showing that, at the time of the refusal to bargain, either (1) the union did not *in fact* enjoy majority support, or (2) the employer had a "good-faith" doubt, founded on a sufficient objective basis, of the union's majority support. *Station KKHI*, 284 N. L. R. B. 1339 (1987), enf'd, 891 F. 2d. 230 (CA9 1989). The question presented in this case is whether the Board must, in determining whether an employer has presented sufficient objective evidence of a good-faith doubt, presume that striker replacements oppose the union.[2]

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[1] Section 8 of the National Labor Relations Act provides, in pertinent part:

"(a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

. . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." 29 U. S. C. §§ 158(a)(1), 158(a)(5).

[2] JUSTICE SCALIA's assertion, *post*, at 801, 807 (dissenting opinion), that the question presented is whether "substantial evidence" supported the Board's "factual finding" that a good-faith doubt was not established in this case misconstrues the issue. The question on which we granted the Board's petition for certiorari is whether, in *assessing* whether a particular employer possessed a good-faith doubt, the Board must adopt a general presumption of replacement opposition to the union. See Pet. for Cert. I ("Whether, in assessing the reasonableness of an employer's asserted

The Board has long presumed that new employees hired in nonstrike circumstances support the incumbent union in the same proportion as the employees they replace. See, *e. g., National Plastic Products Co.*, 78 N. L. R. B. 699, 706 (1948). The Board's approach to evaluating the union sentiments of employees hired to replace strikers, however, has not been so consistent. Initially, the Board appeared to assume that replacements did not support the union. See, *e. g., Stoner Rubber Co.*, 123 N. L. R. B. 1440, 1444 (1959) (stating that it was not "unreasonable [for the employer] to assume that none of the . . . permanent replacements were union adherents"); *Jackson Mfg. Co.*, 129 N. L. R. B. 460, 478 (1960) (stating that it was "most improbable" that replacements desired representation by the strikers' union); *Titan Metal Mfg. Co.*, 135 N. L. R. B. 196, 215 (1962) (finding that employer had "good cause to doubt the Union's majority" because "no evidence that any of the replacements had authorized the Union to represent them" had been presented); *S & M Mfg. Co.*, 172 N. L. R. B. 1008, 1009 (1968) (same).

A 1974 decision, *Peoples Gas System, Inc.*, 214 N. L. R. B. 944 (1974), rev'd and remanded on other grounds *sub nom.*

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doubt that an incumbent union enjoys continued majority support, the Board may refuse to apply any presumption regarding the extent of union support among replacements for striking employees"). Accord, Brief for Petitioner I. Whether the Board permissibly refused to adopt a general presumption applicable to all cases of this type is not an evidentiary question concerning the facts of this particular case. The substantial evidence standard is therefore inapplicable to the issue before us. Rather, we must determine whether the Board's refusal to adopt the presumption is rational and consistent with the Act. *NLRB* v. *Baptist Hospital, Inc.*, 442 U. S. 773, 787 (1979) ("[T]he courts have the duty to review the Board's presumptions both 'for consistency with the Act, and for rationality'") (quoting *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 501 (1978)). Whether substantial evidence supports the Board's finding that respondent did not possess an objectively reasonable doubt is a question for the Court of Appeals to consider, without applying any presumption about replacements' views, on remand.

Teamsters Local Union 769 v. *NLRB,* 174 U. S. App. D. C. 310, 316, 532 F. 2d 1385, 1391 (1976), signalled a shift in the Board's approach. The Board recognized that "it is of course possible that the replacements, who had chosen not to engage in the strike activity, might nevertheless have favored union representation." 214 N. L. R. B., at 947. Still, the Board held that "it was not unreasonable for [the employer] to infer that the degree of union support among these employees who had chosen to ignore a Union-sponsored picket line might well be somewhat weaker than the support offered by those who had vigorously engaged in concerted activity on behalf on *[sic]* Union-sponsored objectives." *Ibid.*

A year later, in *Cutten Supermarket,* 220 N. L. R. B. 507 (1975), the Board reversed course completely, stating that striker replacements, like new employees generally, are presumed to *support* the union in the same ratio as the strikers they replaced. *Id.,* at 509. The Board's initial adherence to this new approach, however, was equivocal. In *Arkay Packaging Corp.,* 227 N. L. R. B. 397 (1976), review denied *sub nom. New York Printing Pressmen & Offset Workers Union, No. 51* v. *NLRB,* 575 F. 2d 1045 (CA2 1978), the Board stated that "it would be wholly unwarranted and unrealistic to presume as a matter of law that, when hired, the replacements for the union employees who had gone out on strike favored representation by the Unions to the same extent as the strikers." 227 N. L. R. B., at 397–398. See also *Beacon Upholstery Co.,* 226 N. L. R. B. 1360, 1368 (1976) (distinguishing *Cutten Supermarket* on the ground that the strikers in *Beacon Upholstery* had been lawfully discharged, so there were no striking employees in the bargaining unit). Nevertheless, in *Windham Community Memorial Hospital,* 230 N. L. R. B. 1070 (1977), enf'd, 577 F. 2d 805 (CA2 1978), the Board explicitly reaffirmed *Cutten Supermarket,* stating that "[t]he general rule . . . is that new employees, including striker replacements, are presumed to support the union in the same ratio as those whom they have replaced." 230

N. L. R. B., at 1070. The Board distinguished *Arkay Packaging* as a "limited exception" to this rule based on "the unique circumstance that the union had apparently abandoned the bargaining unit." 230 N. L. R. B., at 1070. Finally, in 1980, the Board reiterated that the presumption that new employees support the union applies equally to striker replacements. *Pennco, Inc.*, 250 N. L. R. B. 716, 717–718 (1980), enf'd, 684 F. 2d 340 (CA6), cert. denied, 459 U. S. 994 (1982).

In 1987, after several Courts of Appeals rejected the Board's approach,[3] the Board determined that no universal generalizations could be made about replacements' union sentiments that would justify a presumption either of support for or of opposition to the union. *Station KKHI*, 284 N. L. R. B. 1339 (1987). On the one hand, the Board found that the prounion presumption lacked empirical foundation because "incumbent unions and strikers sometimes have shown hostility toward the permanent replacements," and "replacements are typically aware of the union's primary concern for the striker's welfare, rather than that of the replacements." *Id.*, at 1344. On the other hand, the Board found that an antiunion presumption was "equally unsupportable" factually. *Ibid.* The Board observed that a striker replacement "may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives." *Ibid.* Moreover, the Board found as a matter of policy that adoption of an antiunion presumption would "substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line." *Ibid.* See also *Pennco, Inc.*, 250 N. L. R. B., at 717. Accordingly, the Board held that it would not apply any presumption regarding striker replacements' union sentiments, but would determine their views on a case-by-case basis. 284 N. L. R. B., at 1344–1345.

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[3] See n. 7, *infra*.

II

We now turn to the Board's application of its *Station KKHI* no-presumption approach in this case. Respondent Curtin Matheson Scientific, Inc., buys and sells laboratory instruments and supplies. In 1970, the Board certified Teamsters Local 968, General Drivers, Warehousemen and Helpers (hereinafter Union) as the collective-bargaining agent for respondent's production and maintenance employees. On May 21, 1979, the most recent bargaining agreement between respondent and the Union expired. Respondent made its final offer for a new agreement on May 25, but the Union rejected that offer. Respondent then locked out the 27 bargaining-unit employees. On June 12, respondent renewed its May 25 offer, but the Union again rejected it. The Union then commenced an economic strike. The record contains no evidence of any strike-related violence or threats of violence.

Five employees immediately crossed the picket line and reported for work. On June 25, while the strike was still in effect, respondent hired 29 permanent replacement employees to replace the 22 strikers. The Union ended its strike on July 16, offering to accept unconditionally respondent's May 25 contract offer. On July 20, respondent informed the Union that the May 25 offer was no longer available. In addition, respondent withdrew recognition from the Union and refused to bargain further, stating that it doubted that the Union was supported by a majority of the employees in the unit. Respondent subsequently refused to provide the Union with information it had requested concerning the total number of bargaining-unit employees on the payroll, and the job classification and seniority of each employee. As of July 20, the bargaining unit consisted of 19 strikers, 25 permanent replacements, and the 5 employees who had crossed the picket line at the strike's inception.

On July 30, the Union filed an unfair labor practice charge with the Board. Following an investigation, the General Counsel issued a complaint, alleging that respondent's withdrawal of recognition, refusal to execute a contract embodying the terms of the May 25 offer, and failure to provide the requested information violated §§ 8(a)(1) and 8(a)(5) of the NLRA, 29 U. S. C. §§ 158(a)(1), 158(a)(5). In its defense to the charge, respondent claimed that it had a reasonably based, good-faith doubt of the Union's majority status. The Administrative Law Judge agreed with respondent and dismissed the complaint. The Board, however, reversed, holding that respondent lacked sufficient objective basis to doubt the Union's majority support. 287 N. L. R. B. 350 (1987).

First, the Board noted that the crossover of 5 of the original 27 employees did not in itself support an inference that the 5 had repudiated the Union, because their failure to join the strike may have "indicate[d] their economic concerns rather than a lack of support for the union." 287 N. L. R. B., at 352. Second, the Board found that the resignation from their jobs of two of the original bargaining-unit employees, including the chief shop steward, after the commencement of the strike did not indicate opposition to the Union, but merely served to reduce the size of the bargaining unit as of the date of respondent's withdrawal of recognition. *Ibid.*[4] Third, the Board discounted statements made by six employees to a representative of respondent during the strike. Although some of these statements may have indicated rejection of the Union as the bargaining representative, the Board noted, others "appear[ed] ambiguous at best." *Id.*, at 353. Moreover, the Board stated, "[e]ven attributing to them the meaning most favorable to the Respondent, it would merely signify that 6 employees of a total bargaining unit of approximately 50 did not desire to keep the Union as the collective-bargaining representative." *Ibid.*[5]

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[4] The Board also found that statements made by chief shop steward Shady Goodson before his resignation did not indicate his lack of support for the Union. Goodson reportedly told respondent's employee relations director that he was in the middle of an uncomfortable situation in that the employees did not want the strike, that he was having difficulty staffing the picket line, and that the Union was not providing sufficient assistance in maintaining the picket line. The Board found that these statements "conveyed only a disapproval of the Union's conduct of the strike," and could not be "reasonably interpreted as a repudiation of the Union as the employees' representative." 287 N. L. R. B., at 352.

Finally, regarding respondent's hiring of striker replacements, the Board stated that, in acccordance with the *Station KKHI* approach, it would "not use any presumptions with respect to [the replacements'] union sentiments," but would instead "take a case-by-case approach [and] require additional evidence of a lack of union support on the replacements' part in evaluating the significance of this factor in the employer's showing of good-faith doubt." 287 N. L. R. B., at 352. The Board noted that respondent's only evidence of the replacements' attitudes toward the Union was its employee relations director's account of a conversation with one of the replacements. The replacement employee reportedly told her that he had worked in union and nonunion workplaces and did not see any need for a union as long as the company treated him well; in addition, he said that he did not think the Union in this case represented the employees. *Id.*, at 351; see n. 4, *supra*. The Board did not determine whether this statement indicated the replacement employee's repudiation of the Union, but found that the statement was, in any event, an insufficient basis for "inferring the union sentiments of the replacement employees as a group." 287 N. L. R. B., at 353.

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[5] According to respondent's director of employee relations, Elizabeth Price, two of the crossover employees, Tony Lopez and Bill Lee, told her that the Union had done nothing for the employees and that they would not pay their union dues because they would not support the Union. Price also stated that striker J. R. Blackshire expressed his anger over the Union's handling of strike payments and requested reinstatement. Blackshire also reportedly said that "there was no union[,] that people were not supporting it[, and] that there were other striking employees who wanted to return to work." 287 N. L. R. B., at 351. Price also stated that striker Clint Waller told her that he was not walking the picket line because he felt that the Union was not representing the employees, and that he wanted the strike to end. Waller later resigned from the Union. Striker Raymond Brunner reportedly told Price that he had thought about retiring because he no longer wanted to work with the Union. Price stated that striker replacement David Schneider told her that he did not think that the Union supported the employees and did not see any need for a union as long as the employer treated him well. *Ibid.*

The Board therefore concluded that "the evidence [was] insufficient to rebut the presumption of the Union's continuing majority status." *Ibid.* Accordingly, the Board held that respondent had violated §§ 8(a)(1) and 8(a)(5) by withdrawing recognition from the Union, failing to furnish the requested information, and refusing to execute a contract embodying the terms respondent had offered on May 25, 1979. The Board ordered respondent to bargain with the Union on request, provide the requisite information, execute an agreement, and make the bargaining-unit employees whole for whatever losses they had suffered from respondent's failure to execute a contract.

The Court of Appeals, in a divided opinion, refused to enforce the Board's order, holding that respondent was justified in doubting the Union's majority support. 859 F. 2d 362 (CA5 1988). Specifically, the court rejected the Board's decision not to apply any presumption in evaluating striker replacements' union sentiments and endorsed the so-called "Gorman presumption" that striker replacements oppose the union.[6] We granted certiorari, 492 U. S. 905 (1989), to resolve a Circuit split on the question whether the Board must presume that striker replacements oppose the union.[7]

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[6] The "Gorman presumption" derives its name from Professor Robert Gorman's statement in his labor law treatise that "if a new hire agrees to serve as a replacement for a striker (in union parlance, as a strikebreaker, or worse), it is generally assumed that he does not support the union and that he ought not be counted toward a union majority." R. Gorman, Labor Law, Unionization and Collective Bargaining 112 (1976). In context, however, this statement does not appear to endorse a presumption, but seems merely to describe the Board's former approach to evaluating

III

A

This Court has emphasized often that the NLRB has the primary responsibility for developing and applying national labor policy. See, *e. g.*, *Beth Israel Hospital* v. *NLRB*, 437 U. S. 483, 500–501 (1978); *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 236 (1963); *NLRB* v. *Truck Drivers*, 353 U. S. 87, 96 (1957).

> "Because it is to the Board that Congress entrusted the task of 'applying the Act's general prohibitory language in the light of the infinite combinations of events which might be charged as violative of its terms,' that body, if it is to accomplish the task which Congress set for it, necessarily must have authority to formulate rules to fill the interstices of the broad statutory provisions." *Beth Israel Hospital, supra,* at 500–501 (quoting *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 798 (1945)).

This Court therefore has accorded Board rules considerable deference. See *Fall River Dyeing & Finishing Corp.* v.

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replacements' union sentiments. *Id.*, at 112–113 (citing *Titan Metal Mfg. Co.*, 135 N. L. R. B. 196 (1962)).

[7] In addition to the Fifth Circuit in this case, the First and Eighth Circuits have endorsed the presumption that striker replacements oppose the union, albeit in cases in which the Board had applied the contrary presumption rather than its present no-presumption approach. *Soule Glass & Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1110 (CA1 1981); *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203, 1206 (CA8 1979). The Second and Sixth Circuits, however, have rejected the antiunion presumption in cases in which the Board had applied its prounion presumption. *NLRB* v. *Windham Community Hospital*, 577 F. 2d 805, 813 (CA2 1978); *NLRB* v. *Pennco, Inc.*, 684 F. 2d 340 (CA6), cert. denied, 459 U. S. 994 (1982). The Ninth Circuit has not expressly rejected the antiunion presumption but has approved the Board's no-presumption approach. See *NLRB* v. *Buckley Broadcasting Corp.*, 891 F. 2d 230, 233–234 (1989).

NLRB, 482 U. S., at 42; *NLRB* v. *Iron Workers*, 434 U. S. 335, 350 (1978). We will uphold a Board rule as long as it is rational and consistent with the Act, *Fall River*, *supra*, at 42, even if we would have formulated a different rule had we sat on the Board, *Charles D. Bonanno Linen Service, Inc.* v. *NLRB*, 454 U. S. 404, 413, 418 (1982). Furthermore, a Board rule is entitled to deference even if it represents a departure from the Board's prior policy. See *NLRB* v. *J. Weingarten, Inc.*, 420 U. S. 251, 265–266 (1975) ("The use by an administrative agency of the evolutional approach is particularly fitting. To hold that the Board's earlier decisions froze the development of this important aspect of the national labor law would misconceive the nature of administrative decisionmaking"). Accord, *Iron Workers*, *supra*, at 351.

B

Before assessing the Board's justification for rejecting the antiunion presumption, we will make clear precisely how that presumption would differ in operation from the Board's current approach. As noted above, see *supra*, at 777–778, the starting point for the Board's analysis is the basic presumption that the union is supported by a majority of bargaining-unit employees. The employer bears the burden of rebutting that presumption, after the certification year, either by showing that the union in fact lacks majority support or by demonstrating a sufficient objective basis for doubting the union's majority status. Respondent here urges that in evaluating an employer's claim of a good-faith doubt, the Board must adopt a second, subsidiary presumption—that replacement employees oppose the union. Under this approach, if a majority of employees in the bargaining unit were striker replacements, the employer would not need to offer *any* objective evidence of the employees' union sentiments to rebut the presumption of the union's continuing majority status. The presumption of the replacements' opposition to the union would, in effect, override the presumption of continuing majority status. In contrast, under its no-presumption approach, the Board "take[s] into account the particular circumstances surrounding each strike and the hiring of replacements, while retaining the long-standing requirement that the employer must come forth with some objective evidence to substantiate his doubt of continuing majority status." 859 F. 2d, at 370 (Williams, J., dissenting).[8]

C

We find the Board's no-presumption approach rational as an empirical matter. Presumptions normally arise when proof of one fact renders the existence of another fact "so probable that it is sensible and timesaving to assume the truth of [the inferred] fact . . . until the adversary disproves it." E. Cleary, McCormick on Evidence § 343, p. 969 (3d ed. 1984). Although replacements often may not favor the incumbent union, the Board reasonably concluded, in light of its long experience in addressing these issues, that replacements may in some circumstances desire union representation despite their willingness to cross the picket line. Economic concerns, for instance, may force a replacement employee to work for a struck employer even though he otherwise supports the union and wants the benefits of union representation. In this sense the replacement worker is no different from a striker who, feeling the financial heat of the strike on himself and his family, is forced to abandon the picket line and go back to work. Cf. *Lyng* v. *Automobile Workers*, 485 U. S. 360, 371 (1988) (recognizing that "a striking individual faces an immediate and often total drop in income during a strike"). In addition, a replacement, like a nonstriker or a strike crossover, may disagree with the purpose or strategy of the particular strike and refuse to support that strike, while still wanting that union's representation at the bargaining table.

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[8] Contrary to respondent's assertion, the Board's no-presumption approach does not constitute an unexplained abandonment of the good-faith doubt defense to a refusal to bargain charge. The Board's requirement of some objective evidence indicating replacements' opposition to the union does not amount to a requirement that the employer prove that the union *in fact* lacks majority status. To show a good-faith doubt, an employer may rely on circumstantial evidence; to show an actual lack of majority support, however, the employer must make a numerical showing that a majority of employees in fact oppose the union. See, *e. g., Stormor, Inc.*, 268 N. L. R. B. 860, 866–867 (1984) (noting that employer need not show actual loss of majority support to prove good-faith doubt). There is no basis for assuming, then, that the Board has, *sub silentio*, forsaken the good-faith doubt standard.

The American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae*, urges us to reject the good-faith doubt standard and hold that an employer, before withdrawing recognition of the union, must show actual loss of majority status through a Board-conducted election. See also Flynn, The Economic Strike Bar: Looking Beyond the "Union Sentiments" of Permanent Replacements, 61 Temple L. Rev. 691, 720 (1988). This Court has never expressly considered the validity of the good-faith doubt standard. Cf. *Fall River Dyeing & Finishing Corp.* v. *NLRB*, 482 U. S. 27, 41, n. 8 (1987) (citing Board's good-faith doubt standard without passing on its validity). We decline to address that issue here, as both parties assume the validity of the standard, and resolution of the issue is not necessary to our decision. See *United Parcel Service, Inc.* v. *Mitchell*, 451 U. S. 56, 60, n. 2 (1981).

Respondent insists that the interests of strikers and replacements are diametrically opposed and that unions inevitably side with the strikers. For instance, respondent argues, picket-line violence often stems directly from the hiring of replacements. Furthermore, unions often negotiate with employers for strike settlements that would return the strikers to their jobs, thereby displacing some or all of the replacements. See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 513–514 (1983) (BLACKMUN, J., concurring in judgment). Respondent asserts that replacements, aware of the union's loyalty to the strikers, most likely would not support the union. See, *e. g.*, *Leveld Wholesale, Inc.*, 218 N. L. R. B. 1344, 1350 (1975) ("Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job"). In a related argument, respondent contends that the Board's no-presumption approach is irreconcilable with the Board's decisions holding that employers have no duty to bargain with a striking union over replacements' employment terms because the "inherent conflict" between strikers and replacements renders the union incapable of "bargain[ing] simultaneously in the best interests of both strikers and their replacements." *Service Electric Co.*, 281 N. L. R. B. 633, 641 (1986); see also *Leveld Wholesale, supra,* at 1350.

These arguments do not persuade us that the Board's position is irrational. Unions do not inevitably demand displacement of all strike replacements. In *Dold Foods, Inc.*, 289 N. L. R. B. 1323 (1988), the Board based its refusal to presume that the replacements opposed the union in part on this ground:

> "[U]nions often demand, at least in the first instance, that the replacements be discharged and the strikers rehired. Frequently, as in the instant case, the union's position may be modified in the course of the negotiations on the issues underlying the strike. Indeed, in the instant case, as the strike wore on, the Union took a progressively weaker position until . . . it requested only that the Respondent discharge those replacements (about 32 out of 201 total replacements) who had not yet completed the probationary period." *Ibid.* (citation omitted).

The extent to which a union demands displacement of permanent replacement workers logically will depend on the union's bargaining power. Under this Court's decision in *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333 (1938), an employer is not required to discharge permanent replacements at the conclusion of an economic strike to make room for returning strikers; rather, the employer must only reinstate strikers as vacancies arise. The strikers' only chance for immediate reinstatement, then, lies in the union's ability to force the employer to discharge the replacements as a condition for the union's ending the strike. Unions' leverage to compel such a strike settlement will vary greatly from strike to strike. If, for example, the jobs at issue do not require highly trained workers and the replacements perform as well as the strikers did, the employer will have little incentive to hire back the strikers and fire the replacements; consequently, the union will have little bargaining power. Consumers' reaction to a strike will also determine the union's bargaining position. If the employer's customers have no reluctance to cross the picket line and deal with the employer, the union will be in a poor position to bargain for a favorable settlement. Thus, a union's demands will inevitably turn on the strength of the union's hand in negotiations. A union with little bargaining leverage is unlikely to press the employer—at least not very forcefully or for very long—to discharge the replacements and reinstate all the strikers. Cognizant of the union's weak position, many if not all of the replacements justifiably may not fear that they will lose their jobs at the end of the strike. They may still want that union's representation after the strike, though, despite the union's lack of bargaining strength during the strike, because of the union's role in processing grievances, monitoring the employer's actions, and performing other nonstrike roles. Because the circumstances of each strike and the leverage of each union will vary greatly, it was not irrational for the Board to reject the antiunion presumption and adopt a case-by-case approach in determining replacements' union sentiments.[9]

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[9] JUSTICE SCALIA characterizes this view as "embarrassingly wide of the mark" and asserts, without any factual support, that unions "almost certain[ly]" demand displacement of striker replacements. *Post,* at 808 (dissenting opinion). We are confident that the Board, with its vast reservoir of experience in resolving labor disputes, is better situated than members of this Court to determine the frequency with which unions demand displacement of striker replacements.

Furthermore, the facts of this case belie JUSTICE SCALIA's sweeping characterization of the inevitability of such demands, as the Union did not negotiate for the discharge of replacements as a condition for settling the strike. See *infra,* at 793. Contrary to JUSTICE SCALIA's assertion, *post,* Moreover, even if the interests of strikers and replacements conflict *during* the strike, those interests may converge *after* the strike, once job rights have been resolved. Thus, while the strike continues, a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike. Surely replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union.[10] For these reasons, the Board's refusal to adopt an antiunion presumption is not irreconcilable with its position in *Service Electric*, *supra*, and *Leveld Wholesale*, 218 N. L. R. B. 1344 (1975), regarding an employer's obligation to bargain with a striking union over replacements' employment terms.

Furthermore, the Board has not deemed picket-line violence or a union's demand that replacements be terminated

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at 809, an unconditional offer to return to work is hardly the same thing as a demand that the employer discharge all the replacements and rehire the strikers as a condition for ending the strike. Here, at the time of respondent's withdrawal of recognition from the Union, there were only 19 strikers and 25 replacements. Thus, it is unlikely that *all* the replacements would have lost their jobs even if all the strikers were reinstated. Depending on their particular jobs and skills, some replacements might not have felt threatened by the Union's offer to have the strikers return to work. More importantly, a union's *offer* turns into a *demand* only if the union can back up its position with a credible show of economic force. As explained above, *supra*, at 790–791, a union with little bargaining power is unlikely to be able to pressure the employer to reinstate the strikers. Absent record evidence to the contrary, then, we have no basis for questioning the Board's factual finding that the Union was not pressing for discharge of the replacements in this case.

[10] JUSTICE SCALIA appears to misunderstand our position. See *post*, at 810–811 (dissenting opinion). We do not mean that the replacements' attitudes toward the union *after* the strike are relevant to the Board's determination. Rather, we mean only that *during* the strike a replacement may foresee that his interests favor representation by the union after the strike. Thus, even if he opposes the strike itself, he may nevertheless want the union to continue to represent the unit because of the benefits that will accrue to him from representation after the strike.

irrelevant to its evaluation of replacements' attitudes toward the union. The Board's position, rather, is that "the hiring of permanent replacements who cross a picket line, *in itself*, does not support an inference that the replacements repudiate the union as collective-bargaining representative." *Station KKHI*, 284 N. L. R. B., at 1344 (emphasis added). In both *Station KKHI* and this case, the Board noted that the picket line was peaceful, *id.*, at 1345; 287 N. L. R. B., at 352; and in neither case did the employer present evidence that the union was actively negotiating for ouster of the replacements. To the extent that the Board regards evidence of these factors relevant to its evaluation of replacements' union sentiments, then, respondent's contentions ring hollow. Cf. *Stormor, Inc.*, 268 N. L. R. B. 860, 866–867 (1984) (concluding that replacements' crossing of picket line in face of continued violence, together with other evidence, overcame Board's former presumption that replacements favored the union); *IT Services*, 263 N. L. R. B. 1183, 1185–1188 (1982) (holding that picket line violence and union's adamant demand that replacements be terminated, together with antiunion statements by most of replacements, overcame prounion presumption).[11]

In sum, the Board recognized that the circumstances surrounding each strike and replacements' reasons for crossing a picket line vary greatly. Even if replacements often do not support the union, then, it was not irrational for the Board to conclude that the probability of replacement opposition to the union is insufficient to justify an antiunion presumption.

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[11] Thus, assuming for the sake of argument that JUSTICE SCALIA's supposition, *post*, at 808 (dissenting opinion), that unions "almost certain[ly]" demand displacement of all strike replacements is true, such demands will be a factor in the Board's analysis in most cases. There is no reason, however, to force the Board to apply a presumption based on the premise that unions *always* make such demands when cases such as the one before us demonstrate that this premise is false.

D

The Board's refusal to adopt an antiunion presumption is also consistent with the Act's "overriding policy" of achieving "'industrial peace.'" *Fall River,* 482 U. S., at 38 (quoting *Brooks* v. *NLRB,* 348 U. S. 96, 103 (1954)).[12] In *Fall River,* the Court held that the presumption of continuing majority support for a union "further[s] this policy by 'promot[ing] stability in collective-bargaining relationships, without impairing the free choice of employees.'" 482 U. S., at 38 (citation omitted). The Court reasoned that this presumption "enable[s] a union to concentrate on obtaining and fairly administering a collective-bargaining agreement without worrying that, unless it produces immediate results, it will lose majority support." *Ibid.* (citing *Brooks* v. *NLRB, supra,* at 100). In addition, this presumption "remove[s] any temptation on the part of the employer to avoid good-faith bargaining in the hope that, by delaying, it will undermine the union's support among the employees." 482 U. S., at 38.

The Board's approach to determining the union views of strike replacements is directed at this same goal because it limits employers' ability to oust a union without adducing any evidence of the employees' union sentiments and encourages negotiated solutions to strikes. It was reasonable for the Board to conclude that the antiunion presumption, in contrast, could allow an employer to eliminate the union merely by hiring a sufficient number of replacement employees. That rule thus might encourage the employer to avoid good-faith bargaining over a strike settlement, and instead to use the strike as a means of removing the union altogether. Cf. *id.,* at 40 ("Without the presumptions of majority support . . . , an employer could use a successor enterprise as a way of getting rid of a labor contract and of . . . eliminat[ing the union's] continuing presence"). Restricting an employer's ability to use a strike as a means of terminating the bargaining relationship serves the policies of promoting industrial stability and negotiated settlements. Cf. *NLRB* v. *Erie Resistor Corp.*, 373 U. S. 221, 233–234 (1963) ("[The Act's] repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system").

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[12] We do not mean to imply that adoption of the antiunion presumption would be inconsistent with the Act's policy. That question is not before us.

Furthermore, it was reasonable for the Board to decide that the antiunion presumption might chill employees' exercise of their statutory right to engage in "concerted activities," including the right to strike. See 49 Stat. 452, as amended, 29 U. S. C. § 157 ("Employees shall have the right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection"). If an employer could remove a union merely by hiring a sufficient number of replacements, employees considering a strike would face not only the prospect of being permanently replaced, but also a greater risk that they would lose their bargaining representative, thereby diminishing their chance of obtaining reinstatement through a strike settlement. It was rational for the Board to conclude, then, that adoption of the antiunion presumption could chill employees' exercise of their right to strike.[13]

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[13] JUSTICE SCALIA entirely ignores the Board's policy considerations, apparently on the rationale that policy is an illegitimate factor in the Board's decision. See *post*, at 812–813 (dissenting opinion). This argument is founded on the premise that the issue before us is the factual question whether substantial evidence supports the Board's finding that respondent lacked a good-faith doubt. As stated earlier, however, see *supra* at 778–779, n. 2, the real question is whether the Board must, in assessing the objective reasonableness of an employer's doubt, adopt a particular presumption. Certainly the Board is entitled to consider *both* whether the presumption is factually justified *and* whether that presumption would disserve the Act's policies. See *Baptist Hospital*, 442 U. S., at 787. We need not determine whether the Board's policy considerations *alone* would justify its refusal to adopt the presumption urged by respondent because

Although the Board generally may not act "as an arbiter of the sort of economic weapons the parties can use," *NLRB* v. *Insurance Agents*, 361 U. S. 477, 497 (1960), it may adopt rules restricting conduct that threatens to destroy the collective-bargaining relationship or that may impair employees' right to engage in concerted activity. See, *e. g.*, *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U. S., at 412, 418–419 (upholding Board rule prohibiting employer's unilateral withdrawal from multiemployer bargaining unit during impasse, "although it may deny an employer a particular economic weapon," because rule advanced "pre-eminent goal" of stability in bargaining process); *NLRB* v. *Erie Resistor Corp.*, *supra*, at 230–237 (upholding Board decision prohibiting employers from granting superseniority to strike replacements and strike crossovers because of damage superseniority would do to concerted activity and to future bargaining relationship); *NLRB* v. *Great Dane Trailers, Inc.*, 388 U. S. 26, 34–35 (1967) (upholding Board decision that employer's payment of vacation benefits to replacements, crossovers, and nonstrikers but not to strikers violated Act because of its destructive effect on concerted activity). The Board's no-presumption approach is rationally directed at protecting the bargaining process and preserving employees' right to engage in concerted activity. We therefore find, in light of the considerable deference we accord Board rules, see *supra*, at 786–787, that the Board's approach is consistent with the Act.

IV

We hold that the Board's refusal to adopt a presumption that striker replacements oppose the Union is rational and consistent with the Act. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

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we find the Board's decision not irrational as a factual matter. See *supra*, at 788–793.

CHIEF JUSTICE REHNQUIST, concurring.

The Board's "no-presumption" rule seems to me to press to the limit the deference to which the Board is entitled in assessing industrial reality, but for the reasons stated in the opinion of the Court I agree that limit is not exceeded. The Court of Appeals did not consider, free from the use of any presumption, whether there was substantial evidence on the record as a whole to support the Board's determination here, and I believe that is a question best left for the Court of Appeals on remand.

By refusing to allow the employer to resort to what would seem to be commonsense assumptions about the views of an entire class of workers—those hired to replace strikers—the Board sharply limits the means by which an employer might satisfy the "good-faith doubt" requirement. Although the Board's opinion in this case does not preclude a finding of good-faith doubt based on circumstantial evidence, some recent decisions suggest that it now requires an employer to show that individual employees have "expressed desires" to repudiate the incumbent union in order to establish a reasonable doubt of the union's majority status. See *Tube Craft, Inc.*, 289 N. L. R. B. 862, n. 2 (1988); *Johns-Manville Sales Corp.*, 289 N. L. R. B. 358, 361 (1988); *Tile, Terrazzo & Marble Contractors Assn.*, 287 N. L. R. B. 769, n. 2 (1987). It appears that another of the Board's rules prevents the employer from polling its employees unless it first establishes a good-faith doubt of majority status. See *Texas Petrochemicals Corp.*, 296 N. L. R. B. 1057, 1064 (1989) (the standard for employer polling is the same as the standard for withdrawal of recognition). I have considerable doubt whether the Board may insist that good-faith doubt be determined only on the basis of sentiments of individual employees, and at the same time bar the employer from using what might be the only effective means of determining those sentiments. But that issue is not before us today.

JUSTICE BLACKMUN, dissenting.

I agree with much that JUSTICE SCALIA says in his dissent, but I write separately because in certain respects his approach differs from mine. As JUSTICE SCALIA ably demonstrates, the Board's analysis in this case cannot be reconciled with its decisions in cases such as *Service Electric Co.*, 281 N. L. R. B. 633 (1986), and *Leveld Wholesale, Inc.*, 218 N. L. R. B. 1344 (1975). Those decisions rest upon the premises that a striking union inevitably will tend to favor its own members at the expense of replacement workers; that the union cannot reasonably be expected to give balanced representation to the two groups; and that the replacements "can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job." *Id.*, at 1350. Those premises are, to say the least, in considerable tension with the Board's refusal to presume, without direct evidence of employee preferences, that an employer may in good faith doubt that replacement workers support the striking union.

JUSTICE SCALIA's dissent, as I read it, rests upon the belief that the Board was *correct* in *Service Electric* and *Leveld Wholesale*, and that its decision in the instant case is therefore *substantively* irrational. Certainly the views expressed in *Service Electric* and *Leveld Wholesale* accord with my own understanding of industrial reality. It seems to me eminently foreseeable that a striking union will disfavor the workers who have been hired to break the strike; that the union will attempt, as an element of the ultimate settlement, to secure the discharge of replacement employees; and that the replacements will be aware of the antagonism between the union's interests and their own.[1] But if the expert agency were to determine that the participants in the collective-bargaining process no longer behave in this fashion, and if it consistently acted upon this determination, I cannot say at this juncture that the Board's decision would be irrational. To invalidate the Board's order in the present case, it is not necessary to assert that the decision is based upon an implausible assessment of industrial reality. Rather, it is enough to say that the Board in this case has departed, without explanation, from principles announced and reaffirmed in its prior decisions. The agency has made no effort to explain the apparent inconsistency between the decision here and its analyses in *Service Electric* and *Leveld Wholesale*, and its order is invalid on that basis alone.[2]

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[1] See *Belknap, Inc.* v. *Hale*, 463 U. S. 491, 513–514 (1983) (opinion concurring in judgment) ("During settlement negotiations, the union can be counted on to demand reinstatement for returning strikers as a condition for any settlement").

I am struck, moreover, by the Board's lack of empirical support for its position—a significant point in view of the fact that for 25 years the Board presumed that replacement workers opposed the striking union. If the Board's refusal to adopt such a presumption is based, at least in part, on policy concerns (*e. g.*, the fear that employers would abuse the bargaining process by "hiring their way out" of their statutory duty), it seems reasonable to expect the Board to show (or at least to assert) that such abuses actually occurred during the period the presumption was in place. I am also troubled by the fact, noted in THE CHIEF JUSTICE's concurring opinion, *ante*, at 797, that while the Board appears to require that good-faith doubt be established by express avowals of individual employees, other Board policies make it practically impossible for the employer to amass direct evidence of its workers' views.[3] The point, I emphasize, is that the propriety of the no-presumption rule cannot be determined simply by asking whether the rule, in isolation, is irrational or rests on a demonstrably misguided view of the facts. Rather, the reviewing court also must ask whether the agency's decision is the product of an adequate deliberative process and is consonant with other agency pronouncements in analogous areas.

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[2] See *Greater Boston Television Corp.* v. *FCC*, 143 U. S. App. D. C. 383, 394, 444 F. 2d 841, 852 (1970) ("[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute") (footnote omitted), cert. denied, 403 U. S. 923 (1971).

[3] The NLRB has recently reaffirmed its rule that an employer must meet the same good-faith doubt standard in order to poll its employees, petition

Perhaps the difference between my approach and that of JUSTICE SCALIA is one only of emphasis, but I think that the difference is worth noting. Rarely will a court feel so certain of the wrongness of an agency's empirical judgment that it will be justified in substituting its own view of the facts. But courts can and should review agency decisionmaking closely to ensure that an agency has adequately explained the bases for its conclusions, that the various components of its policy form an internally consistent whole, and that any apparent contradictions are acknowledged and addressed. This emphasis upon the decisionmaking *process* allows the reviewing court to exercise meaningful control over unelected officials without second-guessing the sort of expert judgments that a court may be ill equipped to make. Such an approach also affords the agency a broad range of discretion. Confronted with a court's conclusion that two of its policy pronouncements are inconsistent, the agency may choose for itself which path to follow, or it may attempt to explain why no contradiction actually exists.

This Court has never held that the Board is required by statute to recognize the good-faith doubt defense, and the Board's power to eliminate that defense remains an open

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the Board for an election, or withdraw recognition from the union. *Texas Petrochemicals Corp.*, 296 N. L. R. B. 1057, 1064 (1989). If good-faith doubt can be established only by the express statements of individual workers, the employer is placed in a difficult bind. See *Mingtree Restaurant, Inc.* v. *NLRB*, 736 F. 2d 1295, 1297 (CA9 1984) ("By the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition").

question. The Board has not purported to take that step, however, and the agency has articulated no legitimate basis for its conclusion that the employer in this case lacked a good-faith doubt as to the union's majority support. The Board may not assert in one line of cases that the interests of a striking union and replacement workers are irreconcilably in conflict, and proclaim in a different line of decisions that no meaningful generalizations can be made about the union sentiments of the replacement employees. I therefore conclude that the judgment of the Court of Appeals should be affirmed.

I respectfully dissent.

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE KENNEDY join, dissenting.

The Court makes heavy weather out of what is, under well-established principles of administrative law, a straightforward case. The National Labor Relations Board (NLRB or Board) has established as one of the central factual determinations to be made in § 8(a)(5) unfair-labor-practice adjudications, whether the employer had a reasonable, good-faith doubt concerning the majority status of the union at the time it requested to bargain. The Board held in the present case that such a doubt was not established by a record showing that at the time of the union's request a majority of the bargaining unit were strike replacements, and containing no affirmative evidence that any of those replacements supported the union. The question presented is whether that factual finding is supported by substantial evidence. Since the principal employment-related interest of strike replacements (to retain their jobs) is almost invariably opposed to the principal interest of the striking union (to replace them with its striking members) it seems to me impossible to conclude on this record that the employer did not have a reasonable, good-faith doubt regarding the union's majority status. The Board's factual finding being unsupported by substantial evidence, it cannot stand. I therefore dissent from the judgment reversing the Fifth Circuit's refusal to enforce the Board's order.

I

As the Court describes, the union was certified in 1970. In 1979, before the strike, the bargaining unit was composed of 27 employees. After the strike began, 5 employees crossed the picket line and 29 new employees were hired to replace the strikers. On July 16, the union offered to return to work under the terms of respondent's last prestrike proposal. On July 20, respondent rejected this offer, withdrew recognition from the union, and refused to bargain further, stating that it doubted that the union represented a majority of the employees in the bargaining unit. On that date, according to the Board, the bargaining unit consisted of 49 employees: 19 strikers, 5 employees who had crossed the picket line to return to work, and 25 strike replacements. The union filed an unfair-labor-practice charge with the Board, and the Board's General Counsel filed a complaint charging that respondent had violated § 8(a)(5) (and thereby § 8(a)(1)) of the National Labor Relations Act (NLRA), 49 Stat. 452, as amended, 29 U. S. C. §§ 158(a)(1) and (5). After a formal hearing, the Administrative Law Judge (ALJ) found that respondent, at the time it withdrew recognition, had an objectively reasonable, good-faith doubt that the union represented a majority of the employees in the bargaining unit. The General Counsel introduced no evidence that the union in fact commanded the support of a majority of the employees, and the ALJ dismissed the complaint.

The Board reversed and entered an order finding that respondent had violated the NLRA. The Board began by reciting its longstanding rule that "'[a]n employer who wishes to withdraw recognition after a year may do so . . . by presenting evidence of a sufficient objective basis for a reasonable doubt of the union's majority status at the time the employer refused to bargain.'" 287 N. L. R. B. 350, 352 (1987) (quoting *Station KKHI*, 284 N. L. R. B. 1339, 1340 (1987)).

Purporting to evaluate respondent's action under this standard, the Board concluded that respondent had not established a reasonable basis for doubting the union's majority status. First, the Board stated that there was no cause to doubt that the five strikers who crossed the picket line to return to work supported the union, because "[t]he failure of employees to join an economic strike may indicate their economic concerns rather than a lack of support for the union." 287 N. L. R. B., at 352. Second, relying on its decision in *Station KKHI*, the Board stated that the fact that 25 employees in the bargaining unit were strike replacements provided "no evidentiary basis for reasonably inferring the union sentiments of the replacement employees as a group." *Id.*, at 352–353. Third, the Board discounted the statements of 6 employees criticizing the union, because "[e]ven attributing to them the meaning most favorable to the Respondent, it would merely signify that 6 employees of a total of approximately 50 did not desire to keep the Union as the collective-bargaining representative." *Id.*, at 353 (footnote omitted).

The Fifth Circuit denied enforcement of the Board's order on the ground that respondent "was justified in doubting that the striker replacements supported the union," and that the Board's contrary conclusion was not supported by substantial evidence. 859 F. 2d 362, 365, 367 (1988).

II

An NLRB unfair-labor-practice action is the form of administrative proceeding known as formal adjudication, governed by the Administrative Procedure Act (APA), 5 U. S. C. §§ 556, 557. See 5 U. S. C. § 554(a). In fact, it is even somewhat more judicialized than ordinary formal adjudication, since it is governed in addition by the procedural provisions of the NLRA itself, which provide, *inter alia*, that the proceeding "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States," 29 U. S. C. § 160(b). Among the attributes of formal adjudication relevant here, the agency opinion must contain "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record," 5 U. S. C. § 557(c), and a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence," 5 U. S. C. § 706(2)(E); accord, 29 U. S. C. § 160(f) ("[T]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive").

The Board's factual finding challenged in the present case is that there was no "'sufficient objective basis for a reasonable doubt of the union's majority status at the time of the employer refused to bargain.'" 287 N. L. R. B., at 352 (quoting *Station KKHI*, 284 N. L. R. B., at 1340). The Board has held for many years that an employer's reasonable, good-faith doubt as to a certified union's continued majority status is a defense to an unfair-labor-practice charge for refusal to bargain, in the sense that it shifts to the General Counsel the burden to "come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit." *Stoner Rubber Co.*, 123 N. L. R. B. 1440, 1445 (1959) (emphasis in original). The leading case on the subject, cited approvingly in the *Station KKHI* opinion that formed the basis for the Board's holding here, described the good-faith doubt defense as follows:

> "We believe that the answer to the question whether the Respondent violated Section 8(a)(5) of the Act . . . depends, not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of the employees, but upon whether *the Employer in good faith* believed that

> the Union no longer represented the majority of the employees. . . .
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> . . . . .
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> By its very nature, the issue of whether an employer has questioned a union's majority in good faith cannot be resolved by resort to any simple formula. It can only be answered in the light of the totality of all the circumstances involved in a particular case. But among such circumstances, two factors would seem to be essential prerequisites to any finding that the employer raised the majority issue in good faith in cases in which a union had been certified. There must, first of all, have been some reasonable grounds for believing that the union had lost its majority status since its certification. And, secondly, the majority issue must *not* have been raised by the employer in a context of illegal antiunion activities . . . ." *Celanese Corp. of America*, 95 N. L. R. B. 664, 671–673 (1951).

The Board purported to be proceeding on the basis that *Celanese* was still the law, and thus that "the totality of all *[sic]* the circumstances" in the present case did not establish reasonable grounds for doubting majority status. The precise question presented is whether there was substantial evidence to support this factual finding. There plainly was not.

As described above, of the 49 employees in the bargaining unit at the time of respondent's refusal to bargain, a majority (25) were strike replacements, and another 5 were former employees who had crossed the union's picket line. It may well be doubtful whether the latter group could be thought to support the union, but it suffices to focus upon the 25 strike replacements, who must be thought to oppose the union if the Board's own policies are to be believed. There was a deep and inherent conflict between the interests of these employees and the interests of the union. As the Board's cases have explained:

> "Strike replacements can reasonably foresee that, if the union is successful, the strikers will return to work and the strike replacements will be out of a job. It is understandable that unions do not look with favor on persons who cross their picket lines and perform the work of strikers." *Leveld Wholesale, Inc.*, 218 N. L. R. B. 1344, 1350 (1975).
>
> "The Union had been bargaining agent for those discharged employees and there can be no question that the Union's loyalty lay with these employees. The interests of the discharged employees were diametrically opposed to those of the strike replacements. If the discharged employees returned to work, the strike replacements would lose their jobs." *Beacon Upholstery Co.*, 226 N. L. R. B. 1360, 1368 (1976) (footnote omitted).

The Board relies upon this reality of "diametrically opposed" interests as the basis for two of its rules: First, that an employer does not commit an unfair labor practice by refusing to negotiate with the incumbent union regarding the terms and conditions of the replacements' employment. See *Service Electric Co.*, 281 N. L. R. B. 633, 641 (1986). Second, that the union's duty of fair representation does not require it to negotiate in the best interests of the strike replacements regarding the terms and conditions of their employment—in other words, that the union may propose "negotiations leading to replacements being terminated to make way for returning strikers," *ibid.* See *id.*, at 639 ("[I]t is not logical to expect [the striking bargaining] representative to negotiate in the best interests of strike replacements during the pendency of a strike") (internal quotation omitted; citation omitted); *id.*, at 641 (even after the strike has ended, the "inherent conflict between the two groups remains" until the underlying contractual dispute has been resolved); *Leveld Wholesale*, *supra*, at 1350 ("It would be asking a great deal of any union to require it to negotiate in the best interests of strike replacements during the pendency of a strike, where the strikers are on the picket line").

The respondent in this case, therefore, had an employee bargaining unit a majority of whose members (1) were not entitled to have their best interests considered by the complainant union, (2) would have been foolish to *expect* their best interests to be considered by that union, and indeed (3) in light of their status as breakers of that union's strike, would have been foolish not to expect their best interests to be subverted by that union wherever possible. There was, moreover, not a shred of affirmative evidence that any strike replacement supported, or had reason to support, the union. On those facts, any reasonable factfinder must conclude that the respondent possessed, not necessarily a certainty, but at least a reasonable, good-faith doubt, that the union did not have majority support. At least three Courts of Appeals have effectively agreed with this assessment, considering strike replacements as opposed to the union in reversing Board findings of no reasonable, good-faith doubt. See *Soule Glass & Glazing Co.* v. *NLRB*, 652 F. 2d 1055, 1110 (CA1 1981); *National Car Rental System, Inc.* v. *NLRB*, 594 F. 2d 1203, 1206–1207 (CA8 1979); *NLRB* v. *Randle-Eastern Ambulance Service, Inc.*, 584 F. 2d 720, 728–729 (CA5 1978).

In making its no-reasonable-doubt finding, the Board relied upon its decision in *Station KKHI*, which stated:

> "[T]he hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative. . . . In this regard, an employee may be forced to work for financial reasons, or may disapprove of the strike in question but still desire union representation and would support other union initiatives. The presumption of union disfavor is therefore not factually compelling." 284 N. L. R. B., at 1344 (footnotes omitted).

The Court finds this reasoning persuasive: "Economic concerns, for instance, may force a replacement employee to work for a struck employer even though he otherwise supports the union and wants the benefits of union representation." *Ante*, at 789. These responses are entirely inadequate. The question is not whether replacement employees accept employment for economic reasons. Undoubtedly they do—the same economic reasons that would lead them to oppose the union that will likely seek to terminate their employment. Nor is the question whether replacements would like to be represented by *a* union. Some perhaps would. But what the employer is required to have a good-faith doubt about is majority support, not for "union representation" in the abstract, but for representation *by this particular complainant union, at the time the employer withdrew recognition from the union.*

Also embarrassingly wide of the mark is the Court's observation that "[u]nions do not inevitably demand displacement of all strike replacements." *Ante*, at 790. It is not necessary to believe that unions *inevitably* demand displacement of *all* strike replacements in order to doubt (as any reasonable person must) that strike replacements support a union that is under no obligation to take their employment interests into account, and that is *almost certain* to demand displacement of as many strike replacements as is necessary to reinstate former employees. The Court does not accurately describe my position, therefore, when it suggests that I seek "to force the Board to apply a presumption based on the premise that unions *always* make such demands." *Ante*, at 793, n. 11. I seek to force the Board, as the APA requires, to give objectively reasonable probative effect to the reality (expressed in the Board's own opinions and made the basis for rules of law it has adopted) that unions *almost always* make such demands, and that replacement employees know that. That is enough to establish this employer's good-faith doubt.

The Court asserts that "the facts of this case" belie the proposition stated *supra,* at 808, that a union "is almost certain to demand the displacement of as many strike replacements as is necessary to reinstate former employees," because the union in this case "did not negotiate for the discharge of replacements as a condition for settling the strike." *Ante,* at 791, n. 9. That is not true, and even if it were true it would not be determinative of the issue here. According to the Board, this is what happened:

> "On 16 July the Union, *on behalf of the striking employees,* made an unconditional offer *to return to work,* thereby ending the strike. Later on the same day, the Union notified the Respondent that the bargaining unit employees had accepted the Respondent's 25 May collective-bargaining proposal." 287 N. L. R. B., at 351 (emphasis added).

Surely an offer "on behalf of the striking employees . . . to return to work" can only be accepted by allowing the striking employees to return to work. Does the Court really mean to interpret the union's action as agreement that the strike replacements shall stay on the job under the terms of the May 25 collective-bargaining proposal, and the strikers remain unemployed? Or as a proposal that the employer should double its work force, paying both the replacement workers and the returning strikers under the terms of the May 25 offer? Surely the very most that can be said is that the union's offer *left the status of the replacement workers for later negotiation.* No more is necessary to establish a reasonable doubt that the replacement workers would support the union—which, in any such negotiations, could be expected (indeed, would have a legal obligation) to seek displacement of the strikebreakers by the returning strikers. As the Board said in *Service Electric:*

> "[E]ven if the strike be deemed to have ended by virtue of the Union's announcement that it had been termi-

> nated, there is no basis for concluding that the Union suddenly is better able 'to negotiate in the best interests of strike replacements,' *Leveld Wholesale*, . . . 218 NLRB 1344, than it previously had been able to do. The inherent conflict between the two groups remains." 281 N. L. R. B., at 641.

The Court mentions only as an afterthought the fundamental conflict of interests that is at the center of this case:

> "Moreover, even if the interests of strikers and replacements conflict *during* the strike, those interests may converge *after* the strike, once job rights have been resolved. Thus, while the strike continues, a replacement worker whose job appears relatively secure might well want the union to continue to represent the unit regardless of the union's bargaining posture during the strike." *Ante*, at 792 (emphasis in original).

The trouble with this is that it posits a species of replacement worker that will rarely exist unless and until the union has agreed (as it had not in this case) to accept the replacements' employment status—*i. e.*, until "job rights have been resolved." How can there be "a replacement worker whose job appears relatively secure" when the employer agrees to negotiate in good faith with a union that will surely seek the reinstatement of all its strikers? Even a replacement worker who has clear seniority over other replacement workers, and who somehow knows (by what means I cannot imagine) that some of the striking workers no longer want their jobs back,[1] has no means of assurance that the union will do him the favor of bargaining for the employer to honor his seniority among strikebreakers. It seems overwhelmingly likely that the union will want its returning members to have their old jobs back, or better jobs, regardless of the relative seniority of the strikebreakers who would thereby be displaced. I do not dispute that "replacement workers are capable of looking past the strike in considering whether or not they desire representation by the union," *ibid.*—in the same way that a man who is offered $1 million to jump off a cliff is capable of looking past the probable consequence of his performance to contemplate how much fun he would have with $1 million if he should survive. Surely the benefits strike replacements anticipate from their poststrike representation by *this particular union* must be expected to weigh much less heavily in their calculus than the reality that if *this particular union* does the bargaining and gets its way, they will not have poststrike jobs.

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[1] The Court emphasizes that "at the time of respondent's withdrawal of recognition from the Union, there were only 19 strikers and 25 replacements." *Ante*, at 792, n. 9. It is easy for the Court to know this, following a full-dress formal adjudication inquiring into the historical fact. One wonders how or why the replacement workers could be thought to have known it at the time. Surely the union did not advertise the fact that its strike force was dwindling, and it is unlikely that the strikebreakers learned it from the remaining strikers in the course of routine frater-

The Court's only response to this is that the union's ability to achieve displacement of the strike replacements will depend upon its bargaining power. Its bargaining power could conceivably be so weak, and a strike replacement might conceivably so prefer *this* union over other alternatives, that he would be willing to take the chance that the union will try to oust him. *Ante*, at 790–791. I suppose so. It might also be that one of the strike replacements hopes the union will continue as the bargaining representative because, as the employer knows, the union president is his son-in-law. The Board Counsel is entirely free to introduce such special circumstances. But unless they appear in the record, the reasonableness of the employer's doubt must be determined on the basis of how a reasonable person would assess the probabilities—and it is overwhelmingly improbable that a

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nization. Perhaps they knew, but they most probably did not; and whether the employer's doubt about replacement support for the union was reasonable depends, of course, upon whether he reasonably assessed the probabilities.

strikebreaking replacement so much prefers the incumbent union to some other union, or to no union at all, that he will bet his job the union is not strong enough to replace him. The wager is particularly bad because it is so unnecessary, since he and his fellow replacements could achieve the same objective, without risking their jobs in the least, by simply voting for that union, after the strike is over, in a new certification election.

I reiterate that the burden upon the employer here was not to demonstrate 100% assurance that a majority of the bargaining unit did not support the union, but merely "reasonable doubt" that they did so. It seems to me absurd to deny that it sustained that burden.

III

The Court never directly addresses the question whether there was substantial evidence to support the Board's conclusion that respondent had not established a reasonable good-faith doubt of the union's majority status. Indeed, it asserts that that question is not even at issue, since "[t]he question on which we granted the Board's petition for certiorari is whether, in *assessing* whether a particular employer possessed a good-faith doubt, the Board must adopt a general presumption of replacement opposition to the union." *Ante*, at 778, n. 2. That is the equivalent of characterizing the appeal of a criminal conviction, in which the defendant asserts that the indictment should have been dismissed because all the evidence demonstrated that he was not at the scene of the crime, as involving, not the adequacy of the evidence, but rather the question whether the jury was required to adopt the general presumption that a person cannot be in two places at the same time. No more in administrative law than in criminal law is the underlying question altered by characterizing factual probabilities as presumptions. The two are one and the same. The only reason respondent asserts, and the Fifth Circuit held, that the Board *had* to adopt the "presumption" of replacement opposition to the union (I place the word in quotation marks because, as I shall describe, that terminology is misleading) is that to refuse to apply that "presumption" for the reason the Board gave (viz., that it is not in fact an accurate assessment of probabilities) is to deny evidence its inherently probative effect, and thus to produce a decision that is not supported by substantial evidence. The Board's framing of the question presented, like its opinion in this case, invites us to confuse factfinding with policymaking. The Court should not so readily have accepted the invitation.

Prior to its decision in *Station KKHI*, the Board well understood the inevitable logic set forth in Part II above, and had held that an employer has an objectively reasonable basis for doubting the union's majority status when the majority of employees in the bargaining unit are permanent replacements, and there is no other indication regarding the replacements' sentiments toward the union. See *Beacon Upholstery Co.*, 226 N. L. R. B., at 1368; *Titan Metal Mfg. Co.*, 135 N. L. R. B. 196, 215 (1962); *Stoner Rubber Co.*, 123 N. L. R. B., at 1445. In a case called *Cutten Supermarket*, 220 N. L. R. B. 507 (1975), the Board departed, in dictum, from this well-established precedent. There, as the Board describes the case in *Station KKHI*, 284 N. L. R. B., at 1341, the Board "inexplicably stated," with respect to strike replacements: "[I]t is a well-settled principle that new employees are presumed to support the union in the same ratio as those whom they have replaced." 220 N. L. R. B., at 509. This dictum became a Board holding in *Pennco, Inc.*, 250 N. L. R. B. 716 (1980), where the Board stated: "The Board has long held that [the presumption of strike replacement support for the union] *applies as a matter of law*, and it is incumbent upon Respondent to rebut it even, and perhaps especially, in the event of a strike." *Id.*, at 717 (emphasis added). As the Board acknowledged in *Station KKHI:*

> "The Board in *Pennco* cited no cases in support of its assertion that the presumption in question was 'long held.' Indeed, . . . this presumption was not 'long held' at all, but in fact was not articulated in any fashion until *Cutten Supermarket* in 1975, only 5 years prior to *Pennco*, and even then (*i. e.*, in *Cutten*) in dictum and without supporting rationale or precedent." 284 N. L. R. B., at 1343.

Unsurprisingly, given the feeble support for this presumption, the Courts of Appeals (I am still repeating the account in *Station KKHI*) "uniformly rejected it." *Ibid.*

In *Station KKHI*, which is the case that established the framework of reasoning for the decision we review today, the principal issue before the Board was the *Pennco* presumption of replacement support for the union. See 284 N. L. R. B., at 1340. The Board abandoned it. See *id.*, at 1344. The Board went further, however, and here is the error that infects the present opinion:

> "On the other hand, we find the contrary presumption equally unsupportable. Thus, the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative." *Ibid.*

The mistake here is to treat as equivalent elements of decisionmaking, the presumption that strike replacements *do* support the union, and the evidentiary inference that strike replacements do *not* support the union. They are not different applications of the same device, and it does not display a commitment to be governed only by the "real facts" to reject both the one and the other. The former was applied "as a matter of law," *Pennco, supra*, at 717, and not as the product of inference, which is "[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted." Black's Law Dictionary 700 (5th ed.

1979). One can refer to the product of an inference as a presumption: If one knows the identity of the sole Englishman in a certain remote part of Africa, and encounters there a white man in pith helmet sipping a gin and tonic, it is perfectly appropriate to say "Dr. Livingston, I presume." But that sort of presumption, which the text writers used to call "presumption of fact," see 9 J. Wigmore, Evidence § 2491, p. 304 (J. Chadbourn rev. ed. 1981), is quite different from the *Pennco*-type "presumption of law" insofar as concerns both agency power and judicial review, as I shall proceed to explain.

It is the proper business of the Board, as of most agencies, to deal in both presumptions (*i. e.*, presumptions of law) and inferences (presumptions of fact). The former it may create and apply *in the teeth of the facts*, as means of implementing authorized law or policy in the course of adjudication. An example is the virtually irrebuttable presumption of majority support for the union during the year following the union's certification by the Board, *Station KKHI*, 284 N. L. R. B., at 1340. The latter, however—inferences (or presumptions of fact)—are not creatures of the Board but its masters, representing the dictates of reason and logic that must be applied in making adjudicatory factual determinations. Whenever an agency's action is reversed in court for lack of "substantial evidence," the reason is that the agency has ignored inferences that reasonably must be drawn, or has drawn inferences that reasonably cannot be. As I have discussed above, that is what happened here.[2]

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[2] The Court apparently believes that it is all right for the Board to ignore proper factfinding now, so long as it promises to make proper factfinding later. The Court says that "assuming for the sake of argument that . . . unions 'almost certain[ly]' demand displacement of all strike replacements . . . , such demands will be a factor in the Board's analysis in most cases. There is no reason, however, to force the Board to apply a presumption based on the premise that unions *always* make such demands . . . ." *Ante*, at 793, n. 11. This presumably means that when the respondent, having been compelled by the Board to negotiate with this

Of course the Board may choose to implement authorized law or policy in adjudication by *forbidding* a *rational* inference, just as it may do so by *requiring* a *nonrational* one (which is what a presumption of law is). And perhaps it could lawfully have reached the outcome it did here in that fashion—saying that *even though* it must reasonably be inferred that an employer has good-faith doubt of majority status when more than half of the bargaining unit are strike replacements whose job rights have not been resolved, we will not permit that inference to be made. (This would produce an effect close to a rule of law eliminating the good-faith doubt defense except for cases in which the employer can demonstrate, by employee statements, lack of support for the union.) But that is not what the agency did here. It relied on the reasoning of *Station KKHI*, which rested upon the conclusion that, *as a matter of logic and reasoning*, "the hiring of permanent replacements who cross a picket line, in itself, does not support an inference that the replacements repudiate the union as collective-bargaining representative." *Id.*, at 1344. That is simply false. It is bad factfinding, and must be reversed under the "substantial evidence" test.

It is true that *Station KKHI* added, seemingly as a makeweight: "Moreover, adoption of this presumption would disrupt the balance of competing economic weapons long established in strike situations and substantially impair the employees' right to strike by adding to the risk of replacement the risk of loss of the bargaining representative as soon as replacements equal in number to the strikers are willing to cross the picket line." *Ibid.* There are several reasons why

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union, is presented with a proposal for displacement of strike replacements, it may *then* break off negotiations on the grounds that it has a good-faith doubt of the union's majority status. I doubt very much that this is what the Board has in mind. But even if it is, it does not justify the Board's compelling the respondent to negotiate in the first place, when any reasonable person must have entertained a "reasonable doubt" of the union's majority status—which the Board continues to affirm is enough.

we cannot allow this seeming policy justification to suffice for sustaining the agency's action.

First of all, it is set forth as a reason for not adopting a counterfactual presumption, rather than (what would have been necessary to validate the agency's action) a reason for ignoring legitimate factual inferences. It is one thing to say: "The facts do not support conclusion X, and we decline to impose conclusion X as a matter of law, since that would have adverse policy consequences." It is quite another thing to say: "Even though the facts require conclusion X, we reject it for policy reasons." The former is what the Board has said here, and the latter is what it would have to say to support its decision properly on policy grounds. The agency has set forth a reason for *rejecting* the suggestion that it ignore the facts; having found that, on the record, the facts were the opposite of what the agency believed (*i. e.*, there was reasonable good-faith doubt), we have no idea whether the agency would regard the same reason as adequate basis for now *accepting* a suggestion that it ignore the facts. Under long-established principles of judicial review, we cannot make that yet-to-be-made decision on the agency's behalf, but must remand so that the Board may do so. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88 (1943).

Second, by upholding as a counterfactual policy determination a ruling that was made, and defended before the Fifth Circuit, as ordinary factfinding plus the refusal to adopt a counterfactual policy determination, we would be depriving respondent of possible legal defenses that it had no occasion to present to the courts. Section 8(a)(5) of the NLRA is violated only if the employer refuses to bargain "with the representatives" of his employees. 29 U. S. C. § 158(a)(5). The Act does not define the term "representatives," except to say that it "includes any individual or labor organization." § 152 (4). Specifically, it does not say or anywhere suggest that a certified union is the "representative" for purposes of § 158(a) (5) unless and until it is decertified. Because the Board has long acknowledged the good-faith doubt defense, there has been no occasion to test in the courts the proposition that the employer can be liable for refusing to bargain with a certified union that patently does *not* have majority support. The only presumption of law that is applied to effect a policy exception to this defense—the almost irrebuttable presumption of union support for one year after its certification—is arguably authorized as an implementation of the policy of § 159(e)(2), which precludes certification elections more frequently than annually. Even if, moreover, the Board can generally require the employer to bargain with a union that is not a "representative" in the sense of having majority support, there is the further question whether it can require him to bargain with a union that is a "representative" *neither* in that sense *nor* in the sense that it is obligated to bargain in the best interests of the majority of employees. See my earlier discussion of the Board's rule that the union has no duty to represent the interest of replacement employees, *supra*, at 806–807. The Board did not have to confront these issues in the present case, because it did not purport to be deciding the case on the assumption that the union lacked majority support. It found respondent guilty of an unfair labor practice on the ground that there was, *in fact*, no reasonable doubt of the union's majority status; and it is exclusively *that* finding which respondent challenged, both here and in the Fifth Circuit. If we permitted the Board's order to be enforced on the quite different ground that it does not matter whether respondent had a reasonable, good-faith doubt, we not only would be making for the Board a decision it has not yet reached, but also would be depriving respondent of judicial review of that decision.[3]

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[3] The Court says that it "need not determine whether the Board's policy considerations *alone* would justify its refusal to adopt the presumption urged by respondent, because we find the Board's decision not irrational as a factual matter." *Ante*, at 795–796, n. 13. For the reasons just discussed in text, the Board's policy considerations *alone* could not possibly be

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Despite the fact that the NLRB has explicit rulemaking authority, see § 156, it has chosen—unlike any other major agency of the Federal Government—to make almost all its policy through adjudication. It is entitled to do that, see *NLRB* v. *Bell Aerospace Co.*, 416 U. S. 267, 294–295 (1974), but it is not entitled to disguise policymaking as factfinding, and thereby to escape the legal and political limitations to which policymaking is subject. Thus, when the Board purports to find no good-faith doubt because the facts do not establish it, the question for review is whether there is substantial evidence to support that determination. Here there is not, and the Board's order should not be enforced.

What the Court has permitted the Board to accomplish in this case recalls Chief Justice Hughes' description of the unscrupulous administrator's prayer: "'Let me find the facts for the people of my country, and I care little who lays down the general principles.'" Address before Federal Bar Association, February 12, 1931, quoted by Frank, J., in *United States* v. *Forness*, 125 F. 2d 928, 942 (CA2 1942), reprinted in 13 The Owl of Sigma Nu Phi 9, 12 (Feb. 1931). I respectfully dissent.

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held to have justified the refusal in the present case. The Court's statement does make perfectly clear, however, that today's judgment ultimately rests upon the determination that it was "not irrational as a factual matter" for the Board to deny on the present record that respondent had a reasonable, good-faith doubt. That determination is simply not credible.

YELLOW FREIGHT SYSTEM, INC. *v.* DONNELLY

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 89-431. Argued February 28, 1990—Decided April 17, 1990

After respondent filed a charge against petitioner alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Commission issued her a Notice of Right to Sue, which did not identify the forum in which she might sue, but did advise her that she must bring suit within 90 days. Within that period, she filed a complaint in an Illinois county court, alleging that petitioner had discriminated against her on the basis of her sex in violation of the State Human Rights Act. After petitioner filed a motion to dismiss—and outside the 90-day period—respondent moved to amend her complaint to allege that the facts already pleaded also constituted a violation of Title VII. Petitioner removed the case to the Federal District Court and moved to dismiss, contending that, because the state court lacked jurisdiction over a Title VII claim, the original filing in state court could not toll the 90-day period. The District Court rejected this contention and, after a trial on the merits, entered judgment for respondent, which the Court of Appeals affirmed.

Held: Federal courts do not have exclusive jurisdiction over Title VII actions. The fact that Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their jurisdiction is strong evidence that Congress did not intend to divest state courts of concurrent jurisdiction. Although most legislators, judges, and administrators who have been involved in the enactment and interpretation of Title VII may have expected that such litigation would be processed exclusively in federal courts, such anticipation cannot overcome the presumption, recently reaffirmed in *Tafflin* v. *Levitt*, 493 U. S. 455, that state courts have the inherent authority, and are competent, to adjudicate federal claims. Pp. 823-826.

874 F. 2d 402, affirmed.

STEVENS, J., delivered the opinion for a unanimous Court.

Jeffrey Ivan Pasek argued the cause for petitioner. With him on the brief were *Alan M. Lerner* and *Ronald E. Sandhaus*.

John J. Henely argued the cause for respondent. With him on the briefs was *Michael W. Rathsack*.*

JUSTICE STEVENS delivered the opinion of the Court.

The question presented is whether federal courts have exclusive jurisdiction over civil actions brought under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1982 ed.). We recently answered a similar question involving the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U. S. C. §§ 1961–1968. *Tafflin* v. *Levitt*, 493 U. S. 455 (1990). For essentially the reasons set forth in that opinion, we conclude that Congress did not divest the state courts of their concurrent authority to adjudicate federal claims.

I

Respondent is a qualified dock worker. Shortly after moving to Chicago Ridge, Illinois, in 1982, she applied for work at petitioner's facility four blocks from her home. The company had no vacancies, but assured respondent that she would be the first person hired when the situation changed. Petitioner maintained this position in response to respondent's inquiries over the next 1½ years, while it in fact was hiring a number of men. Respondent was hired only after she filed a complaint with the Equal Employment Opportunity Commission (EEOC) in 1984.

On March 15, 1985, the EEOC issued a Notice of Right to Sue. The notice did not identify the forum in which respondent might sue, but it did advise her that she "must do so within ninety (90) days" or that right would be lost. Plaintiff's Exh. B, App. 14. Within the 90-day period, on May 22, 1985, respondent filed a complaint in the Circuit Court of Cook County, Illinois, alleging that petitioner had discrimi-

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**Robert E. Williams, Douglas S. McDowell,* and *Garen E. Dodge* filed a brief for the Equal Employment Advisory Council as *amicus curiae* urging reversal.

nated against her on the basis of her sex in violation of the Illinois Human Rights Act. Ill. Rev. Stat., ch. 68, ¶1–101 *et seq.* (1987).

Petitioner filed a motion to dismiss on the ground that respondent had not exhausted her state administrative remedies. Respondent countered with a motion to amend her complaint to allege that the facts already pleaded also constituted a violation of Title VII of the Civil Rights Act of 1964. This motion was not filed within the 90-day period. Petitioner removed the case to federal court and moved to dismiss the amended complaint. Petitioner argued that the original filing in the state court could not toll the 90-day limitation period because the state court had no jurisdiction over a Title VII claim.[1] The District Court rejected the jurisdictional argument, App. to Pet. for Cert. A–35 to A–39, and, after a trial on the merits, entered judgment for respondent. 682 F. Supp. 374 (ND Ill. 1988). The Court of Appeals for the Seventh Circuit affirmed. 874 F. 2d 402 (1989). Because other Courts of Appeals have held that federal courts have exclusive jurisdiction over Title VII litigation,[2] we granted certiorari, 493 U. S. 953 (1989).

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[1] Petitioner also argued that the Title VII claim was untimely because a complaint merely alleging a violation of the state Act could not toll the federal statute of limitations. The District Court and the Court of Appeals rejected that argument, relying on Rule 15(c) of the Federal Rules of Civil Procedure. App. to Pet. for Cert. A–38 to A–39; 874 F. 2d 402, 410–411 (CA7 1989).

[2] See *Bradshaw* v. *General Motors Corp.*, 805 F. 2d 110, 112 (CA3 1986); *Valenzuela* v. *Kraft, Inc.*, 739 F. 2d 434, 435–436 (CA9 1984); *Jones* v. *Intermountain Power Project*, 794 F. 2d 546, 553 (CA10 1986); *Long* v. *Florida*, 805 F. 2d 1542, 1546 (CA11 1986), rev'd on other grounds, 487 U. S. 223 (1988).

The United States has not filed any *amicus curiae* brief with the Court in this case. In 1980 it contended, in a case that did not directly present the question, that federal courts have exclusive jurisdiction over Title VII actions. Brief for United States and EEOC as *Amici Curiae*, O. T. 1980, No. 79–1213, pp. 11–15; *Minnick* v. *California Dept. of Corrections*, 452 U. S. 105, 120, n. 28 (1981) (cert. dism'd as improvidently granted). See

II

Under our "system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus presumptively competent, to adjudicate claims arising under the laws of the United States." *Tafflin*, 493 U. S., at 458; see *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 477–478 (1981); *Claflin* v. *Houseman*, 93 U. S. 130, 136–137 (1876). To give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction. *Tafflin*, 493 U. S., at 459–460.

We begin with the text of Title VII itself. The enforcement provisions of Title VII provide that "[e]ach United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter." 42 U. S. C. § 2000e–5(f)(3) (1982 ed.). Unlike a number of statutes in which Congress unequivocally stated that the jurisdiction of the federal courts is exclusive,[3] Title VII contains no language that expressly confines jurisdiction to federal courts or ousts state courts of their presumptive jurisdiction. The omission of any such provision is strong, and arguably sufficient, evidence that Congress had no such intent.

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also Brief for EEOC as *Amicus Curiae* in *Pirela* v. *North Aurora*, No. 89–1231 (CA7), pp. 10–14.

[3] The Employee Retirement Income Security Act of 1974—enacted just two years after the extensive amendments to the Civil Rights Act—illustrates this distinction in specifying that "[e]xcept for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter," but that "[s]tate courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section." 29 U. S. C. § 1132(e)(1); Act of Mar. 24, 1972, Pub. L. 92–261, § 4, 86 Stat. 104. See also statutes cited in *Tafflin* v. *Levitt*, 493 U. S. 455, 471 (1990) (SCALIA, J., concurring).

Petitioner, however, contends that the legislative history of Title VII unmistakably reveals Congress' intention that these claims be brought exclusively in the federal courts, and that certain features of Title VII render concurrent state-court jurisdiction incompatible with federal interests. Petitioner has called our attention to a number of passages in the legislative history indicating that many participants in the complex process that finally produced the law fully expected that all Title VII cases would be tried in federal court.[4] That expectation, even if universally shared, is not an adequate substitute for a legislative decision to overcome the presumption of concurrent jurisdiction. Like its plain text, the legislative history of the Act affirmatively describes the jurisdiction of the federal courts, but is completely silent on any role of the state courts over Title VII claims.

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[4] Thus, for example, after it was decided to opt for judicial rather than administrative enforcement of the Act, Congressman McCulloch commented:

"As the Title was originally worded, the Commission would have had authority to not only conduct investigations, but also institute hearing procedures and issue orders of a cease-and-desist nature. A substantial number of committee members, however, preferred that the ultimate determination of discrimination rest with the Federal judiciary. Through this requirement, we believe the settlement of complaints will occur more rapidly and with greater frequency." H. R. Rep. No. 914, 88th Cong., 1st Sess., pt. 2, p. 29 (1963) (additional views).

An Interpretive Memorandum presented to the Senate suggests that the judicial path was presumed to be through the federal courts:

"[T]he party allegedly discriminated against may, with the written permission of one member of the Commission, bring his own suit in Federal court. If he does so, he would conduct the litigation and bear his own costs, just like any other private plaintiff in a civil action.

. . . . .

"The suit against the respondent, whether brought by the Commission or by the complaining party, would proceed in the usual manner for litigation in the Federal courts. It would be a trial de novo and not, in any sense, a suit for judicial review of a Commission determination." 110 Cong. Rec. 7213 (1964) (Interpretive Memorandum of Title VII of H. R. 7152 submitted jointly by Sen. Clark and Sen. Case).

Of course, if Congress had vested exclusive enforcement authority in a federal administrative agency, presumably only a federal court would have had jurisdiction to review the federal agency's decisions. The authorization of a judicial remedy, however, gave rise to the normal presumption that state as well as federal courts could grant appropriate relief.

We do not find any incompatibility between the procedures provided in Title VII and state-court jurisdiction over these claims. Petitioner correctly points out that § 706(c) of the Act requires the EEOC to delay any action on a discrimination charge for at least 60 days to give state or local agencies an opportunity to remedy the allegedly unlawful practice prior to any federal action. 42 U. S. C. § 2000e–5(c) (1982 ed.). Petitioner argues that it is anomalous to contemplate reference to a state agency, followed by review in the federal agency, as a condition of proceeding with litigation in state court. Petitioner's "anomaly," however, is merely a consequence of Title VII's dual-track method of procedure. The first hiatus is designed to give state administrative agencies an opportunity to invoke state rules of law. The action by the EEOC, in contrast, is a predicate for litigation based on the federal statute. When the right to sue under Title VII arises, the fact that both a state agency and the EEOC have failed to resolve the matter does not affect the question of what judicial forum should or may entertain the action. Congress employed a similar scheme in the Age Discrimination in Employment Act of 1967, in which complaints must be screened through both state and federal agencies, although concurrently, before an action may be brought "in any court of competent jurisdiction." 29 U. S. C. §§ 626(c)(1), 633(b). See *Oscar Mayer & Co.* v. *Evans*, 441 U. S. 750 (1979) (§ 14(b) of the ADEA was patterned after § 706(c) of Title VII).

Nor does Title VIII's provision for appeals pursuant to 28 U. S. C. §§ 1291, 1292, and references to injunctive relief and appointment of masters pursuant to Federal Rules of Civil Procedure 65 and 53, preclude concurrent state-court jurisdiction. 42 U. S. C. §§ 2000e–5(j), (f)(2), (f)(5) (1982 ed.).

We rejected a similar argument based on statutory references to procedures applicable to federal courts in *Tafflin*, 493 U. S., at 466–467 (federal venue and service of process in RICO actions), and *Charles Dowd Box Co.* v. *Courtney*, 368 U. S. 502 (1962) (injunctive relief under federal rules in Labor Management Relations Act, 1947, actions).

It may be assumed that federal judges will have more experience in Title VII litigation than state judges. That, however, is merely a factor that the plaintiff may weigh when deciding where to file suit, or that may motivate a defendant to remove a case to federal court. We have no reason to question the presumption that state courts are just as able as federal courts to adjudicate Title VII claims. Cf. *Kremer* v. *Chemical Construction Corp.*, 456 U. S. 461 (1982) (state-court decisions may have preclusive effect in Title VII cases before federal courts).

In sum, without disagreeing with petitioner's persuasive showing that most legislators, judges, and administrators who have been involved in the enactment, amendment, enforcement, and interpretation of Title VII expected that such litigation would be processed exclusively in federal courts, we conclude that such anticipation does not overcome the presumption of concurrent jurisdiction that lies at the core of our federal system.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

KAISER ALUMINUM & CHEMICAL CORP. ET AL. *v.* BONJORNO ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 88–1595. Argued December 4, 1989—Decided April 17, 1990*

Respondents (Bonjorno), the sole stockholders of a now defunct aluminum pipe fabrication company, brought suit against petitioners (Kaiser) in the District Court, alleging that Kaiser had monopolized the market for such pipe in violation of the Sherman Act. Judgment for Bonjorno on a jury verdict and damages award was entered on August 22, 1979. However, the District Court found that this judgment was not supported by the evidence and held a limited retrial on the issue of damages, which resulted in a jury award of $9,567,939 on December 2, 1981. After judgment was entered on December 4, 1981, the District Court granted a partial judgment notwithstanding the verdict. The Court of Appeals, *inter alia*, vacated the latter judgment and reinstated and affirmed the December 4 judgment, issuing its mandate in 1986. The postjudgment interest statute in effect when Bonjorno's complaint was filed provided that "interest shall be calculated from *the date of the entry of judgment*, at *the* rate allowed by State law." 28 U. S. C. § 1961 (1976 ed.) (emphasis added). In 1982, while the appeal was pending, an amended § 1961 went into effect, which specified that "interest shall be calculated *from the date of the entry of the judgment*, at *a* rate" based on the yield for United States Treasury bills settled "*immediately prior to the date of the judgment.*" 28 U. S. C. § 1961 (1982 ed.) (emphasis added). The District Court held that § 1961 required interest to be calculated from December 2, 1981, the date of the damages verdict. However, it rejected Bonjorno's argument that *Bradley* v. *Richmond School Bd.*, 416 U. S. 696—which held that courts are to apply the law in effect at the time of decision except where retrospective application would result in manifest injustice to one of the parties or where there is clear congressional intent to the contrary—required that the amended version of the statute be applied to determine the applicable interest rate. The Court of Appeals affirmed the District Court's determination of the date from which interest should be calculated, but reversed on the issue of which version of § 1961 applied.

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*Together with No. 88–1771, *Bonjorno et al.* v. *Kaiser Aluminum & Chemical Corp. et al.*, also on certiorari to the same court.

Held:

1. Postjudgment interest properly runs from the date of the entry of judgment, not the date of the verdict. Both versions of § 1961 refer specifically to the "date of judgment," which indicates a date certain, and there is no legislative history that would indicate a contrary congressional intent. Pp. 834–835.

2. Interest should be calculated from December 4, 1981, rather than August 22, 1979, the date of the District Court's legally insufficient judgment. The purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damages and the payment by the defendant. It would be counterintuitive to believe that Congress intended interest to be calculated from a judgment on damages that was not supported by the evidence, since such damages have not been "ascertained" in any meaningful way. Pp. 835–836.

3. Amended § 1961 is not applicable to judgments entered before its effective date. The plain language of both versions of § 1961 evidences clear congressional intent that the interest rate for any particular judgment is to be determined as of the date of the judgment, and that a single applicable rate of interest is to be applied to the judgment for the duration of the interest accrual period. In addition, Congress delayed the effective date of the amended version by six months to permit courts and attorneys to prepare for the change in the law, and, therefore, at the very least, the amended version cannot be applied before its effective date. Implicit in the amended provision's legislative history—which indicates that Congress wished to lessen the incentives of losing defendants to take frivolous appeals in order to collect interest at the prevailing market rates while paying plaintiffs at the lower state-set rates—is the understanding that, on the date of judgment, expectations with respect to liability would be fixed so that the parties could make informed decisions about the cost and potential benefits of paying the judgment or seeking appeal. This Court need not reconcile the apparent tension between the two lines of precedent governing retrospective application that are represented by *Bradley* v. *Richmond School Bd.*, *supra*, and *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204, which held that congressional enactments will not be construed to have retroactive effect unless their language requires this result. Under either view, where the congressional intent is clear, it governs. Pp. 836–840.

4. The equities of the case do not require that the rate of interest be set at a rate higher than that afforded by § 1961. Where Congress has not seen fit to provide for a higher interest rate with respect to antitrust

suits and has set a definite applicable rate, the courts may not legislate to the contrary. P. 840.

865 F. 2d 566, affirmed in part, reversed in part, and remanded.

O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, SCALIA, and KENNEDY, JJ., joined. SCALIA, J., filed a concurring opinion, *post*, p. 840. WHITE, J., filed a dissenting opinion, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, *post*, p. 858.

Richard P. McElroy argued the cause for petitioners in No. 88–1595 and respondents in No. 88–1771. With him on the briefs was *Ann B. Laupheimer*.

Henry T. Reath argued the cause for respondents in No. 88–1595 and petitioners in No. 88–1771. With him on the briefs was *Edward G. Biester III*.

JUSTICE O'CONNOR delivered the opinion of the Court.

We are called upon in these cases to decide the applicable rate of postjudgment interest and the date from which postjudgment interest should be calculated pursuant to the federal postjudgment interest statute. 28 U. S. C. § 1961 (1982 ed.) (amended).

I

Respondents (Bonjorno) were the sole stockholders of now defunct Columbia Metal Culvert Co., Inc., which was at one time a fabricator of aluminum drainage pipe in Vineland, New Jersey. Bonjorno brought suit against petitioners (Kaiser) in the United States District Court for the Eastern District of Pennsylvania on the theory that Kaiser had monopolized the market for aluminum drainage pipe in the Mid-Atlantic region of the United States in violation of the Sherman Act. 26 Stat. 209, as amended, 15 U. S. C. §§ 1 and 2.

At the first trial, the District Court entered a directed verdict for Kaiser. The Court of Appeals for the Third Circuit reversed, holding that there was sufficient evidence for the case to go to the jury. *Columbia Metal Culvert Co.* v. *Kaiser Aluminum & Chemical Corp.*, 579 F. 2d 20, 37 (1978).

On August 21, 1979, a second trial resulted in a jury verdict in Bonjorno's favor in the trebled amount of $5,445,000. The judgment was entered on August 22, 1979. The District Court held that the evidence did not support the jury's damages award and granted Kaiser's motion for a new trial as to damages only. *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, 518 F. Supp. 102, 109, 119 (ED Pa. 1981). A limited retrial on damages resulted in a jury award on December 2, 1981, in the trebled amount of $9,567,939. Judgment was entered on December 4, 1981. On January 17, 1983, the District Court granted Kaiser's motion for judgment notwithstanding the verdict as to a portion of the damages awarded by the jury. *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, 559 F. Supp. 922 (ED Pa.). Bonjorno appealed the reduction in damages, and the Court of Appeals reversed the District Court's partial grant of Kaiser's motion for judgment notwithstanding the verdict as to damages, vacated the judgment, and reinstated and affirmed the judgment entered on December 4, 1981. *Bonjorno* v. *Kaiser Aluminum & Chemical Corp.*, 752 F. 2d 802, 815 (CA3 1984). Kaiser's petition for rehearing in banc was denied, 1985–1 CCH Trade Cases ¶66,551 (CA3 1985), as was its subsequent petition for certiorari to this Court. *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 477 U. S. 908 (1986).

The Court of Appeals did not refer in its opinion to the allowance of postjudgment interest; Bonjorno petitioned the Court of Appeals for instructions regarding interest to be included in the mandate pursuant to Federal Rule of Appellate Procedure 37, which permits courts of appeals to direct payment of interest commencing with the entry of judgment in the district court unless otherwise provided by law. Before the Court of Appeals could rule on the petition, the parties entered into a stipulation providing that the District Court first address all issues of interest allowable under 28 U. S. C. § 1961 and Federal Rule of Appellate Procedure 37. The Court of Appeals approved the stipulation and certified the judgment in lieu of a formal mandate. On July 1, 1986, the mandate of the Court of Appeals, stayed pending disposition of Kaiser's petition for a writ of certiorari with this Court, was issued to the District Court. On July 3, 1986, Kaiser paid Bonjorno $9,567,939, the trebled amount of damages awarded by the jury on December 2, 1981.

The federal statute governing awards of postjudgment interest in effect at the time Bonjorno filed the complaint on January 17, 1974, and until October 1, 1982, provided:

> "Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied from interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of judgment, at the rate allowed by State law." 28 U. S. C. § 1961 (1976 ed.).

On April 2, 1982, Congress passed the Federal Courts Improvement Act of 1982, Pub. L. 97–164, 96 Stat. 25, § 302 of which amended 28 U. S. C. § 1961. To permit courts and the bar to prepare themselves for the changes wrought by the Act, Congress delayed its effective date by six months to October 1, 1982. § 402, 96 Stat. 57. The amended version provides:

> "(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefor may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immedi-

> ately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall distribute notice of that rate and any changes in it to all Federal judges.
>
> "(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually." 28 U. S. C. § 1961 (1982 ed.).

The District Court held that 28 U. S. C. § 1961 required interest to be calculated from December 2, 1981, the date of the damages verdict on which the correct judgment would have been entered but for the District Court's erroneous partial grant of judgment notwithstanding the verdict. App. to Pet. for Cert. A–31, A–36 to A–41. See *Poleto* v. *Consolidated Rail Corp.*, 826 F. 2d 1270, 1280 (CA3 1987) (interest calculated from date of verdict rather than judgment); *Institutionalized Juveniles* v. *Secretary of Public Welfare*, 758 F. 2d 897, 927 (CA3 1985) (interest calculated from date correct award would have been entered but for the District Court's error). The District Court rejected Bonjorno's argument that the amended version of § 1961 should be applied for the purpose of determining the applicable interest rate under *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974) (courts are to apply the law in effect at the time a court renders its decision unless such application results in manifest injustice or runs contrary to congressional intent), reasoning that application of amended § 1961 would result in manifest injustice. Thus, the District Court applied the earlier version of § 1961, which set the interest rate allowed by state law. App. to Pet. for Cert., at A–41 to A–50. At that time, Pennsylvania provided for a 6 percent rate of interest. 42 Pa. Cons. Stat. § 8101 (1988); Pa. Stat. Ann., Tit. 41, § 202 (Purdon Supp. 1989).

The Court of Appeals affirmed the District Court's determination that interest should be calculated from December 2, 1981, but reversed the District Court on the issue of which version of § 1961 applied. The Court of Appeals invoked the rule in *Bradley, supra,* that a court should apply the law in effect at the time a court renders its decision, but noted that "the *Bradley* presumption of applying the law in effect at the time a court renders its decision in the absence of contrary legislative intent seems inconsistent with the long-standing rule of statutory construction that statutes are presumed to have only 'prospective' effect and will be given 'retroactive' effect only if there is affirmative legislative direction to do so." 865 F. 2d 566, 573 (CA3 1989). Finding the legislative history unclear and that application of the amended § 1961 would not result in manifest injustice, the Court of Appeals held that the *Bradley* presumption required application of the amended § 1961 in effect at the time the District Court and the Court of Appeals reached their decisions.

The Court of Appeals acknowledged that its decision was in conflict with decisions on the same issue in other Courts of Appeals. Three approaches have been followed by the Courts of Appeals: (1) the amended version of § 1961 is applied to judgments entered after the effective date, see *United States* v. *Dollar Rent A Car Systems, Inc.*, 712 F. 2d 938, 940, n. 5 (CA4 1983); *Merit Ins. Co.* v. *Leatherby Ins. Co.*, 728 F. 2d 943, 944 (CA7), cert. denied, 469 U. S. 918 (1984); *Litton Systems, Inc.* v. *American Tel. & Tel. Co.*, 746 F. 2d 168, 174 (CA2 1984); *Brooks* v. *United States*, 757 F. 2d 734, 741–742 (CA5 1985); (2) the amended version applies to judgments entered before the effective date for the duration of the postjudgment interest period, see *R. W. T.* v. *Dalton*, 712 F. 2d 1225, 1234–1235 (CA8), cert. denied, 464 U. S. 1009 (1983); and (3) the amended version applies to judgments entered before the effective date but only for interest accruing in the period after the effective date. See *Bailey* v. *Chattem, Inc.*, 838 F. 2d 149, 155–156 (CA6), cert. denied, 486 U. S. 1059 (1988); *Campbell* v. *United States*, 809 F. 2d 563, 577 (CA9 1987).

We granted certiorari, 491 U. S. 903 (1989), primarily to consider three questions: First, whether interest should be calculated from the date of verdict or the date of judgment; second, whether interest should be calculated from the date of a legally insufficient judgment; and third, the proper application of § 1961 to judgments entered before the effective date of amended § 1961.

II

A

Kaiser argues that the appropriate date from which interest should be calculated is the date of the entry of the later judgment, December 4, 1981, and not the date of the verdict, December 2, 1981. Both the Court of Appeals and the District Court held that postjudgment interest should be calculated from December 2, 1981, the date of verdict, relying on settled Third Circuit precedent. See *Poleto* v. *Consolidated Rail Corp.*, *supra,* at 1280 (interest calculated from date on which jury returns verdict on damages). The Courts of Appeal are split on this issue. Compare *Millers' Nat'l Ins. Co., Chicago, Ill.* v. *Wichita Flour Mills Co.*, 257 F. 2d 93, 104 (CA10 1958) (interest calculated from date of judgment), with *Turner* v. *Japan Lines, Ltd.*, 702 F. 2d 752 (CA9 1983) (interest calculated from date of verdict). Those courts that have determined that interest should run from the verdict have looked to the policy underlying the postjudgment interest statute—compensation of the plaintiff for the loss of the use of the money—in reaching their conclusion that interest should run from the date of the verdict despite the language of the statute. See, *e. g.*, *Poleto*, *supra.* Cf. Note, Interest on Judgments in the Federal Courts, 64 Yale L. J. 1019, 1039 (1955) ("Allowance of interest from verdict [under state postjudgment statutes despite their plain language] is generally based on the defendant's fault in causing the delay in entry of judgment and on the desirability of fully compensating the plaintiff for the loss of use of his recovery").

The starting point for interpretation of a statute "is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). "By linking all post-judgment activity to the entry of a judgment, the courts have been provided a uniform time from which to determine post-judgment issues." Comment, Post-Judgment Interest in Federal Courts, 37 Emory L. J. 495, 499 (1988). Both the original and the amended versions of § 1961 refer specifically to the "date of judgment," which indicates a date certain. Neither alludes to the date of the verdict, and there is no legislative history that would indicate congressional intent that interest run from the date of verdict rather than the date of judgment. Even though denial of interest from verdict to judgment may result in the plaintiff bearing the burden of the loss of the use of the money from verdict to judgment, the allocation of the costs accruing from litigation is a matter for the legislature, not the courts. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U. S. 240, 271 (1975). In light of the plain language and the absence of legislative intent to the contrary, we conclude that postjudgment interest properly runs from the date of the entry of judgment.

B

Bonjorno asserts, in its cross-petition, that the judgment from which interest should be calculated is not that entered in December 1981, but rather the judgment entered on August 22, 1979, the damages portion of which the District Court later found was not supported by the evidence. The District Court's determination that the jury's finding on damages was not supported by the evidence was not appealed by either party.

"[T]he purpose of postjudgment interest is to compensate the successful plaintiff for being deprived of compensation for the loss from the time between the ascertainment of the damage and the payment by the defendant." *Poleto* v. *Consolidated Rail Corp.*, 826 F. 2d, at 1280. Where the judgment on damages was not supported by the evidence, the damages have not been "ascertained" in any meaningful way. It would be counterintuitive, to say the least, to believe that Congress intended postjudgment interest to be calculated from such a judgment. See *FDIC* v. *Rocket Oil Co.*, 865 F. 2d 1158 (CA10 1989) (postjudgment interest may not be calculated from judgment that was completely reversed).

Accordingly, we hold that the Court of Appeals properly rejected Bonjorno's contention that interest should be calculated from August 22, 1979, but erred in calculating interest from December 2, 1981, rather than December 4, 1981.

III

The Court in *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974), faced the issue whether an attorney's fees statute that went into effect during the pendency of the appeal was to be applied by the appellate court. Relying on *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), the Court held that "a court is to apply the law in effect at the time it renders its decision." 416 U. S., at 711. The Court derived this holding from a broad reading of *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801), in which the following principles were articulated:

> "[I]f subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed. . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws." *Id.*, at 110.

Under the rule set forth in *Schooner Peggy*, an amendment to the law while a case was pending should be applied by the appellate court only if, "by its terms," the law was to be applied to pending cases. See *Bradley, supra,* at 712. In *Thorpe, supra,* the Court broadened the rule set forth in *Schooner Peggy:* "[E]ven where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." *Bradley, supra,* at 715. As a means of softening the potentially harsh impact of this broadening retrospective application of congressional enactments, the Court recognized two exceptions to the presumption that courts are to apply the law in effect at the time of decision. The presumption does not govern where retrospective application would result in manifest injustice to one of the parties or where there is clear congressional intent to the contrary. See 416 U. S., at 711. The Court of Appeals applied the *Bradley* test and held that the legislative history was ambiguous and that retrospective application of amended § 1961 did not result in manifest injustice.

In apparent tension with the rule articulated in *Bradley, supra,* is our recent reaffirmation of the generally accepted axiom that "[r]etroactivity is not favored in the law. . . . [C]ongressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown University Hospital,* 488 U. S. 204, 208 (1988). In *Georgetown University Hospital,* we held that the Department of Health and Human Services did not have the power to promulgate retroactive cost-limit rules, because authority to issue retroactive rules was not authorized by Congress in the Medicare Act. *Id.,* at 208–216.

We need not in this case, however, reconcile the two lines of precedent represented by *Bradley, supra,* and *Georgetown, supra,* because under either view, where the congressional intent is clear, it governs. See *Bradley, supra,* at 716–717 (intervening statute applies retroactively unless a contrary intention appears); *Georgetown, supra,* at 208 (statute does not apply retroactively unless its language requires it). We conclude that the plain language of both the original and amended versions of § 1961 evidences clear congressional intent that amended § 1961 is not applicable to judgments entered before its effective date.

As both the original and the amended versions of § 1961 indicate, a court must consider two factors to determine how much postjudgment interest is owed: (1) the length of time the interest is to run, which requires identification of a starting point and an ending point, and (2) the interest rate at which the interest is to be computed. Section 1961, originally and as amended, provides the starting point—the date of the entry of judgment—and the interest rate. The termination point is set by the party who pays the judgment, and in general it may occur at any time following entry of judgment.

Under both versions of § 1961, the calculation of interest is inextricably tied to the date of the entry of judgment. Both provisions provide that the interest due "shall be calculated *from the date of the entry of the judgment.*" Indeed, even the calculation of the interest *rate* in amended § 1961 is tied to the judgment date: "interest shall be calculated . . . at a rate equal to the coupon issue yield equivalent . . . of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled *immediately prior to the date of the judgment.*" See *Litton*, 746 F. 2d, at 174 (calculation of rate tied to judgment date indicates Congress intended prospective application of amended § 1961).

The language of each version of the statute also directs that a single applicable rate of interest be applied to the judgment: The prior version refers to "*the* rate" and the amended version to "*a* rate." See Comment, 37 Emory L. J., at 532–533, n. 207 ("[P]lain language of the [amended version] indicates that only one interest rate will apply"). We think the most logical reading of the statute is that the interest rate for any particular judgment is to be determined as of the date of the judgment, and that is the single rate applicable for the duration of the interest accrual period.

Congress delayed the effective date on the amended version by six months to permit courts and attorneys to prepare for the change in the law. S. Rep. No. 97–275, p. 32 (1981) ("[T]he delay is intended to provide time for planning the transition and for permitting the bar to become familiar with the provisions"). Thus, at the very least, the amended version cannot be applied before the effective date of 1982. See *Campbell* v. *United States*, 809 F. 2d, at 574 ("[T]he literal terms of the Senate committee report . . . preclude imposition of interest at the T-bill rate . . . in the period prior to the enactment date"). Given that the plain language only admits of one relevant interest rate and that the amended rate cannot be applied before the effective date of October 1, 1982, we conclude that the interest rate to be applied to judgments entered before October 1, 1982, is the rate set pursuant to the prior version of § 1961.

In the brief legislative history available, there is a single stated purpose for Congress' alteration of the interest rate from the state rate to the Treasury bill rate. Under the prior version of § 1961, "a losing defendant may have an economic incentive to appeal a judgment solely in order to retain his money and accumulate interest on it at the commercial rate during the pendency of the appeal." S. Rep. No. 97–275, *supra*, at 30. Because the prevailing state-set rates were significantly lower than market rates, losing parties found it economical to pursue frivolous appeals. Implicit in Congress' desire to alter the incentives to appeal is the understanding that, at the time judgment is entered, the parties are capable of calculating the value or cost of the interest throughout the time period during which the judgment remains unpaid. In other words, on the date of judgment expectations with respect to interest liability were fixed, so that the parties could make informed decisions about the cost and potential benefits of paying the judgment or seeking appeal. Given Congress' understanding of the expectation of the parties on the date of judgment and the plain language of the statute, we conclude that both versions of § 1961 fix the rate of interest as of the date of the entry of judgment and, therefore, amended § 1961 may not be applied retrospectively. See 865 F. 2d, at 577 (Stapleton, J., concurring and dissenting) ("[T]he rule established by § 1961 after its amendment, as well as the rule established by it before, are focused on a particular point in time—the date of the entry of judgment. On that date, under both rules, the rate of postjudgment interest is fixed once and for all time for the particular case, and the rate fixed takes effect immediately").

Because the entry of judgment in this litigation occurred before October 1, 1982, we reverse the Court of Appeals' determination that amended § 1961 governs the calculation of postjudgment interest.

IV

Finally, in its cross-petition, Bonjorno asserts that the equities of the case require that the rate of interest be set at a rate higher than that afforded by § 1961. "At common law judgments do not bear interest; interest rests solely upon statutory provision." *Pierce* v. *United States*, 255 U. S. 398, 406 (1921). Where Congress has not seen fit to provide for a higher rate of interest with respect to antitrust suits and has set a definite interest rate that governs this litigation, the courts may not legislate to the contrary.

For the foregoing reasons, the judgment of the Court of Appeals is reversed in part and affirmed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SCALIA, concurring.

I join the Court's opinion because I agree that this statute, 28 U. S. C. § 1961 (1982 ed.), contains positive indication that its operation is to be prospective. In my view, however, that indication is unnecessary to our determination. I regret that the Court has chosen not to resolve the conflict between two relatively recent cases saying that unless there is specific indication to the contrary a new statute should be applied retroactively absent "manifest injustice," *Bradley* v. *Richmond School Bd.*, 416 U. S. 696, 716 (1974); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268, 282 (1969), and the many cases, old and new, which have said that unless there is specific indication to the contrary a new statute should be applied only prospectively, *e. g.*, *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204, 208 (1988); *United States* v. *American Sugar Refining Co.*, 202 U. S. 563, 577 (1906). In the rules of construction that they announce, if not in the results they produce, these two lines of cases are not merely, as the Court confesses, in "apparent tension," *ante*, at 837; they are in irreconcilable contradiction, and have spawned Courts of Appeals opinions to match. Compare, *e. g.*, *Davis* v. *Omitowoju*, 883 F. 2d 1155, 1170–1171 (CA3 1989), and *Anderson* v. *USAIR, Inc.*, 260 U. S. App. D. C. 183, 187, 818 F. 2d 49, 53 (1987), with *United States* v. *R. W. Meyer, Inc.*, 889 F. 2d 1497, 1505–1506 (CA6 1989), and *United States* v. *Marengo County Comm'n*, 731 F. 2d 1546, 1553–1555 (CA11), appeal dism'd, 469 U. S. 976 (1984). Since the issue has been briefed and argued in this case, I would have taken the occasion to admit that the rule we expressed in *Thorpe* and *Bradley* was wrong, and to reaffirm the clear rule of construction that has been applied, except for these last two decades of confusion, since the beginning of the Republic and indeed since the early days of the common law: absent specific indication to the contrary, the operation of nonpenal legislation is prospective only.[1]

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[1] I limit the expression of the rule to nonpenal legislation because a contrary presumption (*i. e.*, a presumption of retroactivity) is applied to the repeal of punishments.

"[I]t has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for

I

During all of the 19th and most of the 20th centuries, our cases expressed and applied, to my knowledge without exception, the principle that legislation is to be applied only prospectively unless Congress specifies otherwise. See the numerous cases cited in Smead, The Rule Against Retroactive Legislation: A Basic Principle of Jurisprudence, 20 Minn. L. Rev. 775, 781, n. 22 (1936). To give a few examples: In *United States* v. *Heth*, 3 Cranch 399, 413 (1806), we refused to apply a new (lower) commission rate for customs collectors to amounts already bonded but not yet collected at the time the new rates took effect. Justice Paterson wrote: "Words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative, that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied." In *Murray* v. *Gibson*, 15 How. 421, 423 (1854), we refused to apply retroactively a Mississippi statute limiting to three years the period in which another state-court judgment would be enforced by Mississippi courts against a citizen of that State. We reaffirmed that "[a]s a general rule for the interpretation of statutes, it may be laid down, that they never should be allowed a retroactive operation where this is not required by express command or by necessary and unavoidable implication. Without such command or implication they speak and operate on the future only." A case very similar to the one we decide today is *United States* v. *Magnolia Petroleum Co.*, 276 U. S. 160 (1928). There respondent had been overassessed

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violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Yeaton* v. *United States*, 5 Cranch 281, 283 (1809).

See also *United States* v. *Tynen*, 11 Wall. 88, 95 (1871) ("There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence"). For convenience' sake, in the remainder of this opinion I will generally omit this qualification in my expression of the rule.

on federal income and profits taxes. At the time it requested a refund of its overpayment and at the time the refund was allowed by the Commissioner, the relevant statute provided that interest on the amount was "to commence six months after the filing of claim for refund," *id.*, at 161, unless the taxes had been paid under protest. Before the refund was made, however, Congress amended the statute to provide that interest should run from the actual date of the overpayment. Respondent then argued, as do the Bonjorno respondents in these cases, that because "the interest had not yet been paid, respondent became entitled to an amount calculated according to the later enactment." *Id.*, at 162. We rejected this argument, reaffirming the presumption that "[s]tatutes are not to be given retroactive effect or construed to change the status of claims fixed in accordance with earlier provisions unless the legislative purpose so to do plainly appears." *Id.*, at 162–163. See also the following expressions of the rule:

> "Where it is claimed that a law is to have a retrospective operation, such must be clearly the intention, evidenced in the law and its purposes, or the court will presume that the lawmaking power is acting for the future only and not for the past . . . ." *White* v. *United States*, 191 U. S. 545, 552 (1903).
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> "There are certain principles which have been adhered to with great strictness by the courts in relation to the construction of statutes as to whether they are or are not retroactive in their effect. The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other. It ought not to receive such a construction unless the words used are so clear, strong and imperative that no other meaning can be annexed to them or unless the intention of the legislature cannot be otherwise satisfied." *United States Fidelity*

> *& Guaranty Co.* v. *United States ex rel. Struthers Wells Co.*, 209 U. S. 306, 314 (1908).
>
> "[A] retrospective operation will not be given to a statute which interferes with antecedent rights or by which human action is regulated, unless such be the unequivocal and inflexible import of the terms, and the manifest intention of the legislature." *Union Pacific R. Co.* v. *Laramie Stock Yards Co.*, 231 U. S. 190, 199 (1913).
>
> "The initial admonition is that laws are not to be considered as applying to cases which arose before their passage unless that intention be clearly declared.
>
> . . . . .
>
> "If the absence of such determining declaration leaves to the statute a double sense, it is the command of the cases, that that which rejects retroactive application must be selected." *Shwab* v. *Doyle*, 258 U. S. 529, 534–535 (1922).
>
> "[A] statute cannot be construed to operate retrospectively unless the legislative intention to that effect unequivocally appears." *Miller* v. *United States*, 294 U. S. 435, 439 (1935).

During these more than 150 years of doctrinal certainty, we did not always deny retroactive application to new statutory law. But when we accorded it, the reason was that the statute affirmatively so required. See, *e. g.*, *Watson* v. *Mercer*, 8 Pet. 88 (1834); *Graham & Foster* v. *Goodcell*, 282 U. S. 409 (1931). If the new law was silent as to its application, we consistently employed the presumption that it applied only prospectively. See Smead, 20 Minn. L. Rev., at 780–781, and n. 22.

II

A

The current confusion began with the case of *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969), involving the eviction of a tenant from low-income housing operated by the city of Durham, North Carolina. The tenant alleged that her lease had been terminated because of her activities in organizing a tenants' association, thus violating her First Amendment rights. That claim was rejected by the North Carolina Supreme Court and we granted certiorari. While the case was pending here, the federal Department of Housing and Urban Development promulgated a regulation directing that "before instituting an eviction proceeding local housing authorities . . . should inform the tenant . . . of the reasons for the eviction . . . ." *Id.*, at 272. We held that the regulation had to be applied retroactively, to invalidate the eviction order issued almost 18 months before the regulation had been adopted. "The general rule," we said, "is that an appellate court must apply the law in effect at the time it renders its decision." *Id.*, at 281.

Thorpe made no mention of our earlier presumption against retroactive application, and cited none of the numerous cases supporting that rule. The reason, apparently, was that it treated as distinctive the situation in which (as in *Thorpe*) the change in law occurs between the decision of a lower court and the decision of the appellate tribunal. Thus, it cited and discussed only a few cases in which that situation, or a closely analogous situation, obtained. Foremost among these was Chief Justice Marshall's opinion in *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801). The issue there was whether a French vessel, seized by an American ship, could be condemned. The Circuit Court had held that condemnation was proper, but before this Court could issue its decision, the United States entered into a convention with France which provided for the restoration of all French "[p]roperty captured, and not yet *definitively* condemned . . . ." *Id.*, at 107 (emphasis in original). In its determination of whether this provision applied to the case before it, the Court examined the explicit language and held that the phrase "and not yet *definitively* condemned" required application of the convention to all cases where property had not yet reached final condemnation, even if that property had been seized preconvention. *Id.*, at 109. Explaining this holding, and specifically rejecting respondent's argument that if the judgment below was correct it could not "be made otherwise by any thing subsequent to its rendition," *ibid.*, the Court stated:

> "[I]f, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed . . . ." *Id.*, at 110.

It is clear that what *Schooner Peggy* meant by a law that "positively changes the rule which governs" was one which, like the law there at issue, explicitly recites its application to preenactment events. That is evident from its ensuing discussion:

> "It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns, where individual rights, acquired by war, are sacrificed for national purposes, the contract making the sacrifice ought always to receive a construction conforming to its manifest import; and if the nation has given up the vested rights of its citizens, it is not for the court, but for the government, to consider whether it be a case proper for compensation. In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Ibid.*

As I have mentioned, *Thorpe* derived from *Schooner Peggy* the "general rule . . . that an appellate court must apply the law in effect at the time it renders its decision." 393 U. S., at 281. Of course it does not stand for that at all—or at least not in the sense that *Thorpe* implied. It stands for the proposition that when Congress *plainly says—contrary* to the ordinary presumption which courts will "struggle hard" to apply—that current law rather than the pre-existing law governs the rights of parties, then courts "must apply" that current law. That is in no way different from the rule applied in the generality of cases discussed in Part I of this opinion: If retroactive effect is explicit, retroactive effect is accorded.

Besides *Schooner Peggy*, the *Thorpe* opinion cited only four cases in support of the presumption of retroactivity. Two of them, *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U. S. 538 (1941), and *Carpenter* v. *Wabash R. Co.*, 309 U. S. 23 (1940), involved, like *Schooner Peggy* and *Thorpe* itself, a change of law that had occurred between the initial and the appellate decision. The third, *United States* v. *Chambers*, 291 U. S. 217 (1934), involved a change that had occurred after a criminal defendant had pleaded guilty but before judgment had been rendered. The fourth, *Ziffrin, Inc.* v. *United States*, 318 U. S. 73 (1943), involved a change that had occurred after application for a license had been made but before it had been ruled upon. In all four of these cases, the new law was adopted as the rule of decision. Once again, however, there was nothing in these decisions contrary to the normal rule of presumptive nonretroactivity of statutes described in Part I above. *Vandenbark* gave retroactive effect not to a statute but to a judicial decision, which is of course traditionally regarded as an expression of pre-existing law. See *United States* v. *Security Industrial Bank*, 459 U. S. 70, 79 (1982) ("The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student"). *Carpenter* gave retroactive effect to a statute that (like the statute in *Schooner Peggy*) on its face explicitly demanded retroactive effect. *Chambers* gave retroactive effect to the repeal of a criminal statute, which has always been an exception to the general rule that statutes are prospective, see n. 1, *supra*. The last case, *Ziffrin, Inc.* v. *United States*, *supra*, did not involve retroactive effect at all, but simply required the Interstate Commerce Commission to apply current law (rather than the law in effect at the time of filing of the permit application) in determining whether the applicant was qualified to obtain a permit for future operations. The same result would have obtained in all of these cases if the change in law had occurred *before* the initial judicial decision, or *before* the initial step of the adjudicatory process.

B

The confusion that *Thorpe* introduced into this otherwise settled area of law was reinforced and perhaps expanded five years later, in *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974). There we held that a statute providing for the award of attorney's fees, enacted while an appeal from the District Court's award of fees was pending, had to be applied by the Court of Appeals. The opinion said:

> "In the wake of *Schooner Peggy*, . . . it remained unclear whether a change in the law occurring while a case was pending on appeal was to be given effect only where, by its terms, the law was to apply to pending cases, . . . or, conversely, whether such a change in the law must be given effect *unless* there was clear indication that it was *not* to apply in pending cases. For a very long time the Court's decisions did little to clarify this issue.
>
> "Ultimately, in *Thorpe* v. *Housing Authority of the City of Durham*, . . . the broader reading of *Schooner Peggy* was adopted, and this Court ruled that 'an appellate court must apply the law in effect at the time it renders its decision.' . . .
>
> "Accordingly, we must reject the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature." *Id.*, at 712–715 (footnote omitted).

The reason I say that *Bradley* perhaps expanded the confusion of *Thorpe* is not because of its holding. Whereas *Thorpe* could not possibly have come out the way it did under prior law, *Bradley* probably would not, but might have. It is at least arguable that it does not constitute retroactive application to apply a provision dealing with the award of costs or fees in litigation to all litigation that has not yet terminated when the provision takes effect. But the reason I say that *Bradley* perhaps expanded the confusion of *Thorpe* is that its formulation of the governing principle was arguably more far reaching. The *Thorpe* formulation ("[A]n *appellate court* must apply the law in effect at the time it renders its decision," 393 U. S., at 281 (emphasis added)) suggests that the rule of retroactivity applies only when the law has been changed between the initial and the appellate decision. The *Bradley* formulation ("[A] change in the law is to be given effect *in a pending case*" (emphasis added)) more naturally suggests that all judicial decisions must apply current law, no matter when the change occurred.

The cases relied upon by *Bradley*, however, see 416 U. S., at 712–713, n. 17, like the cases relied upon by *Thorpe*, all involve changes in law that occurred after an earlier stage of an adjudicatory proceeding—thus once again excluding from the relevant precedent the many cases I have alluded to in Part I setting forth the presumption of nonretroactivity. But also like the cases relied upon by *Thorpe*, not a single one of them is genuinely contrary to that generally applied presumption. They consist entirely of cases that involved retroactivity of judicial decisions rather than statutes *(Moores* v. *National Bank*, 104 U. S. 625 (1882); *Dorchy* v. *Kansas*, 264 U. S. 286 (1924); *Sioux County* v. *National Surety Co.*, 276 U. S. 238 (1928); *Patterson* v. *Alabama*, 294 U. S. 600 (1935); *Vandenbark* v. *Owens-Illinois Glass Co., supra);* cases in which the statute specifically provided for retroactive application (*Freeborn* v. *Smith*, 2 Wall. 160, 162 (1865); *Stephens* v. *Cherokee Nation*, 174 U. S. 445, 477–478 (1899); *Carpenter* v. *Wabash R. Co., supra*, at 27; *Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382, 383 (1940)); cases that involved prospective rather than retrospective application, because they sought injunctive relief (*Dinsmore* v. *Southern Express Co.*, 183 U. S. 115, 120 (1901); *United States* v. *Alabama*, 362 U. S. 602 (1960) *(per curiam))*, because the issue was a permit for future action (*Ziffrin, Inc.* v. *United States*, 318 U. S. 73 (1943)), or because the issue was whether the United States' declaration of war made it inappropriate for the trial court to continue with proceedings (*Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U. S. 9 (1918)); a case remanding to state court for *its* determination of the effect of a newly enacted state statute (*Missouri ex rel. Wabash R. Co.* v. *Public Service Comm'n*, 273 U. S. 126 (1927)); and a case involving the special rule, see n. 1, *supra*, applicable to repeal of a criminal sanction (*United States* v. *Chambers*, 291 U. S. 217 (1934)).

It is significant that *not a single one* of the earlier cases cited in *Thorpe* and *Bradley*—except, of course, the cases dealing with judicial decisions rather than statutes and the case dealing with repeal of a criminal statute—even *purports* to be applying a presumption of retroactivity. They purport to be following the *express* command of the statute, or not to be acting retroactively at all. One of the cases, however, does mention as applicable to this (supposedly) special area of change-in-law-pending-appeal, the general presumption of *non*retroactivity applicable elsewhere:

> "The contention is that the act of July 1, 1898, in extending the remedy by appeal to this court was invalid because retrospective, an invasion of the judicial domain, and destructive of vested rights. By its terms the act was to operate retrospectively, and as to that it may be observed that *while the general rule is that statutes should be so construed as to give them only prospective operation*, yet where the language employed expresses a contrary intention in unequivocal terms, the mere fact that the legislation is retroactive does not necessarily render it void." *Stephens* v. *Cherokee Nation*, *supra*, at 477–478 (emphasis added).

C

While *Thorpe* was the first case setting forth the presumption of retroactivity, and *Bradley* was the case expounding its supposed precedential basis in greatest detail, a number of other cases since *Thorpe* have referred to and (purportedly) applied the presumption, with citation of *Thorpe*, *Bradley*, or both, and sometimes with citation of one or more of the other cases (discussed above) cited in *Bradley*. These follow-on cases share two significant characteristics: First, all of them, like *Thorpe* and *Bradley*, involved a change in the law after the initial adjudication. Where the change has occurred prior to initial adjudication, we have made no mention of the *Thorpe-Bradley* presumption but, to the contrary, have discussed as though it was uncontroverted "[t]he principle that statutes operate only prospectively," *United States* v. *Security Industrial Bank*, 459 U. S., at 79—and (in seeming inconsistency with the analysis of *Thorpe* and *Bradley*) have even quoted from *Schooner Peggy* to support that principle, 459 U. S., at 79–80. Our most recent affirmation of the presumption of nonretroactivity (where the statute antedated initial adjudication) occurred last Term in *Bowen* v. *Georgetown University Hospital*, 488 U. S., at 208, where the following strong statement of the traditional rule was necessary to our unanimous decision:

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result . . . . By the same principle, a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."

The second significant feature of the cases citing the *Thorpe-Bradley* presumption is that all of them would have come out the same way applying the pre-*Thorpe* law—for reasons similar to those mentioned earlier in my discussion of the cases cited by *Bradley*. Most of them involved prospective rather than retrospective application, since they sought injunctive or declaratory relief. See *Hall* v. *Beals*, 396 U. S. 45, 48 (1969); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U. S. 402, 417–419 (1971); *Diffenderfer* v. *Central Baptist Church of Miami, Inc.*, 404 U. S. 412, 414 (1972); *California Bankers Assn.* v. *Shultz*, 416 U. S. 21, 49, n. 21 (1974); *Cort* v. *Ash*, 422 U. S. 66, 76–77 (1975); *Youakim* v. *Miller*, 425 U. S. 231, 237 (1976) *(per curiam); Treasury Employees* v. *Von Raab*, 489 U. S. 656, 663 (1989). Some involved the retroactive effect of judicial decisions rather than statutes. See *Hamling* v. *United States*, 418 U. S. 87, 102 (1974); *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U. S. 473, 486, n. 16 (1981); *Saint Francis College* v. *Al-Khazraji*, 481 U. S. 604, 608 (1987); *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 662 (1987). And in one case we found explicit legislative indication of retroactive intent. See *Hutto* v. *Finney*, 437 U. S. 678, 694–695, n. 23 (1978).

In only one of the cases would *Thorpe-Bradley* have yielded a result different from the result produced by prior law—and there, significantly, we followed the prior law. *Bennett* v. *New Jersey*, 470 U. S. 632 (1985), was a suit by the Secretary of Education to recover from the State of New Jersey funds provided to it under Title I of the Elementary and Secondary Education Act of 1965, Pub. L. 89–10, 79 Stat. 27, that had allegedly been used for ineligible programs. After the Department of Education's administrative determination of misuse had been made, and a final determination letter demanding repayment had been issued, Title I was amended in a fashion which, the State alleged, would have validated its prior expenditures. Although this seemed to be a classic case for application of the *Thorpe-Bradley* presumption, we applied the opposite presumption instead. We distinguished *Bradley* on the ground that in the case before us "the Government's right to recover any misused funds preceded the 1978 Amendments." 470 U. S., at 639. We quoted *Bradley's* acknowledgment that there was an exception to its presumption for retroactive application that "'would infringe upon or deprive a person of a right that had matured or become unconditional,'" *ibid.*, quoting from 416 U. S., at 720, and noted that this "comports with another venerable rule of statutory interpretation, *i. e.*, that statutes affecting substantive rights and liabilities are presumed to have only prospective effect." 470 U. S., at 639. I would have thought that the language from *Bradley* referred to *vested rights*, which could not be retroactively eliminated without just compensation. By expanding the meaning of that limitation to include *all* "substantive rights and liabilities" we arguably deprived *Bradley* of its distinctive content, inasmuch as retroactive application is never sought (or defended against) except as a means of "affecting substantive rights and liabilities" at issue in the litigation. Even the purely procedural requirement of stating the reason for termination of a lease, which was at issue in *Thorpe*, affected the substantive right of the landlord to produce an effective termination of the lease and enforce an eviction. I suppose it would be possible to distinguish between statutes that alter "substantive rights and liabilities" directly, and those that do so only by retroactively adding a procedural requirement, the failure to comply with which alters the "substantive rights and liabilities"—but I fail to see the sense in such a distinction.

III

What the record shows, therefore is the following: (1) An unbroken line of precedent, prior to 1969, applying a presumption that statutes are not retroactive (except for repeal of penal provisions) in *all* cases. (2) In 1969, with *Thorpe*, a departure from that tradition (based upon a misreading of our precedent) for cases in which the statute has been enacted after initial adjudication. (3) From 1969 to the present, (a) firm adherence to the prior tradition in cases not involving postadjudication enactment, and (b) the expression of adherence to the new presumption in postadjudication-enactment cases, but with only one case (*Bradley*, in 1974) where that probably produced a difference in outcome, and with one case (*Bennett*, in 1985) where it seemingly should have produced a difference in outcome but was not permitted to do so.

It is doubtful, on the basis of this record, whether the *Thorpe-Bradley* presumption of retroactivity survives at all. If it does, however, it *only* survives (as it was begotten) as a special rule applicable to changes in law after initial adjudication. That the traditional presumption of nonretroactivity continues to apply in all other cases is clear from our decisions in *United States* v. *Security Industrial Bank*, 459 U. S. 70 (1982), and *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204 (1988). The difficulty is, however, that it is quite impossible to apply the traditional presumption in "enactment-before-adjudication" cases and the *Thorpe-Bradley* presumption in "enactment-after-adjudication" cases, as a moment's reflection will make plain. This would mean nonsuiting the plaintiff who has won a tort judgment that is on appeal when the statute abolishing the tort is enacted, while rendering judgment in favor of plaintiffs who sue later for preenactment torts. It would be irrational to produce these results.[2]

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[2] Perhaps it would be rational to do the opposite—that is, to say that acts which have been *initially* adjudicated, like acts which have been *finally* adjudicated and thus placed beyond the reach of the new statute by the doctrine of res judicata, will *not* be affected by a new law, even when acts not yet adjudicated *are* affected. The possibility of such special treatment perhaps explains why judges feel it necessary to discuss cases involving amendment pending appeal as a separate category: not in order to establish that a *special* rule of retroactivity applies to them, but to make clear that when the generally applicable presumption of nonretroactivity has been rebutted by the text of the statute, the then-ensuing *general* retroactivity of the statute will apply to those cases, just as it does to matters not yet in litigation.

In the last analysis, in other words, *Thorpe* and *Bradley* cannot avoid confronting the vast body of case law I have described in Part I of this opinion. It is ultimately not a question of dealing with the narrow category of "cases pending" or "cases on appeal" when the statute was enacted—as to which one might plausibly (though erroneously) say, as *Bradley* did, that "[f]or a very long time the Court's decisions did little to clarify this issue." 416 U. S., at 713. Rather, it is a question of adopting in all cases, and contrary to an immense volume of precedent, the presumption that statutes have retroactive effect. That unthinkable course was rejected, as recently as last Term, in *Georgetown*.

Precedent aside, however, even as an original matter there is nothing to be said for a presumption of retroactivity—neither in the narrow context of "cases pending" or "cases on appeal" nor *(a fortiori)* in the logically compelled broader context of all cases. It is contrary to fundamental notions of justice, and thus contrary to realistic assessment of probable legislative intent. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks, see 2 P. Vinogradoff, Outlines of Historical Jurisprudence 139–140 (1922), by the Romans, see Justinian Code, Book 1, Title 14, § 7, by English common law, see 3 H. Bracton, De Legibus et Consuetudinibus Angliae 531 (T. Twiss trans. 1880); Smead, 20 Minn. L. Rev., at 776–778, and by the Code Napoleon, 1 Code Napoleon, Prelim. Title, Art. I, cl. 2 (B. Barrett trans. 1811). It has long been a solid foundation of American law. Chancellor Kent said that "it cannot be admitted that a statute shall, by any fiction or relation, have any effect before it was actually passed." 1 J. Kent, Commentaries on American Law *455. Justice Story said that "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the

Constitution § 1398 (2d ed. 1851). The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law, U. S. Const., Art. I, § 9, cl. 3; see *Calder* v. *Bull*, 3 Dall. 386 (1798), and prohibits (or requires compensation for) all retroactive laws that destroy vested rights, see *Hodel* v. *Irving*, 481 U. S. 704 (1987); *United States Trust Co. of N. Y.* v. *New Jersey*, 431 U. S. 1 (1977). A provision of the New Hampshire Constitution, adopted in 1784 and still in effect, states: "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." N. H. Const., Pt. 1, Art. 23. The Constitutions of other States also proscribe retroactive laws, see, *e. g.*, Colo. Const., Art. II, § 11; Mont. Const., Art. XIII, § 1, cl. 3; Ohio Const., Art. II, § 28, and the codes of some States contain a provision specifying that all laws are to be applied prospectively unless a contrary intent (of varying specificity) appears. See, *e. g.*, N. Y. Statutes Law § 51b (McKinney 1971) ("unless the language of the statute either expressly or by necessary implication requires . . . retroactive construction"); Pa. Stat. Ann., Tit. 46, § 556 (Purdon 1969) ("when clearly and manifestly so intended by the Legislature"). The presumption of nonretroactivity, in short, gives effect to enduring notions of what is fair, and thus accords with what legislators almost always intend.

The *Thorpe-Bradley* rule does the opposite, as the peculiar preannounced exception to its application makes clear. A background rule of retroactivity is so patently contrary to probable legislative intent that it could not possibly be applied (as the presumption of *non*retroactivity is applied) *whenever* there is no legislative indication to the contrary. So *Thorpe* and *Bradley* have invented an all-purpose exception to their counterintuitive rule: retroactivity will not be assumed where that will produce "manifest injustice." What that might mean (viz., almost anything) is well enough exemplified by *Thorpe*. There we did not consider it "manifestly unjust," on the basis of a federal regulation adopted 18 months after the fact, to prevent a landlord from evicting a tenant whose lease had been terminated in full compliance (as we assumed) with all applicable laws. Is there any doubt that we *would* have found it "manifestly unjust" *to evict* the tenant if the sequence were reversed—that is, if the landlord had *not* complied, at the time of lease termination, with a regulation repealed 18 months later? "Manifest injustice," I fear, is just a surrogate for policy preferences. Indeed, it cannot be otherwise. Once one begins from the premise of *Thorpe* and *Bradley* that, contrary to the wisdom of the ages, it is not in and of itself unjust to judge action on the basis of a legal rule that was not even in effect when the action was taken, then one is not really talking about "justice" at all, but about mercy, or compassion, or social utility, or whatever other policy motivation might make one favor a particular result. A rule of law, designed to give statutes the effect Congress intended, has thus been transformed to a rule of discretion, giving judges power to expand or contract the effect of legislative action. We should turn this frog back to a prince as soon as possible.

* * *

I do not pretend that clear reaffirmation of the presumption of nonretroactivity will always make it simple to determine the application in time of new legislation. It will remain difficult, in many cases, to decide whether the presumption has been overcome by text, and indeed to decide whether a particular application *is* retroactive.[3] But however many obstacles may remain along the route, surely it is essential to agree upon our point of departure. The *Thorpe-Bradley* presumption of retroactivity, which is arguably formulated to apply to a relatively narrow class of cases but which logically must be extended across the board, misleads prospective litigants and confuses judges of the lower courts. I would say that it confuses even Congress itself—except that I believe and hope that legislators choose their language with the assumptions that just men and women normally entertain, rather than the assumptions derived from consulting the latest decision of this Court.

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[3] The latter difficulty inheres to some degree in the present case. Arguably it would not be giving retroactive effect to a new statutory interest rate for judgments if one applied that rate to all outstanding balances on judgments, with respect to all periods of time after the statute's effective date—regardless of when the judgments were rendered. It depends upon what one considers to be the determinative event by which retroactivity or prospectivity is to be calculated. If it is the *entry* of judgment, then only judgments rendered after the effective date will be covered by prospective

I would eliminate the confusion of the past two decades and reaffirm unqualifiedly the principle of construction that reflects both our long applied jurisprudence and the reality of legislative intent: A statute is deemed to be effective only for the future unless contrary intent appears.

JUSTICE WHITE, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join, dissenting.

The Court today holds that the amended version of the federal postjudgment interest statute, 28 U. S. C. § 1961 (1982 ed.), does not apply to a judgment entered before the effective date of the amendment, even though the litigation was still pending when the amendment took effect and the Dis-

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application; but if it is the day-by-day assessment of interest against an owing sum, then judgments rendered before the effective date will be affected as well, but only with respect to interest calculated after the effective date. Thus, what is covered by prospective application would have been a different question in the present case if the new interest rate set by the statute were a fixed, flat percentage for the entire term of the judgment debt, or even a percentage that varied from month to month over the term to comport with some varying external reference. In fact, however, the rate here is a fixed percentage for the entire term, calculated on the basis of the rate provided by a varying external reference *at or near the time of judgment.* This suggests to me that Congress was addressing future judgments, rather than future days on which interest is owing. The application of the presumption, like the presumption itself, seeks to ascertain the probable legislative intent.

trict Court calculated the amount of postjudgment interest long after the effective date. Because I cannot concur in the Court's decision denying effect to an important ameliorative federal statute in precisely the kind of situation demonstrating the need for the amendment, I respectfully dissent.

I

I begin where the majority does, with the language of § 1961. In concluding that the plain language of the statute decides this case, the majority stresses that both versions of § 1961 provide that the interest due "shall be calculated from the date of the entry of the judgment." *Ante*, at 838 (emphasis omitted). But this clause only fixes the starting point from which interest is to be allowed; it indicates that § 1961 is in fact a postjudgment interest statute, not a prejudgment interest statute (or a postverdict interest statute, see *ante*, at 835). This clause does not direct the rate to be applied to money judgments. That matter is governed by the following clause of § 1961, requiring that interest be calculated at the Treasury bill rate settled immediately prior to the date of the judgment.

The majority's error results from a subtle but significant misreading of § 1961. The statute, as just noted, states that interest shall be calculated "from" the entry of the judgment. But the majority reads § 1961 as if it says that interest shall be calculated "*at* the date of the entry of the judgment" or "*as if at* the date of the entry of judgment." The majority essentially interprets § 1961 as commanding the district courts to transport themselves back in time to the judgment date to determine the rate of postjudgment interest, not because § 1961 directs the district courts to do so in ascertaining the Treasury bill rate (which it plainly does), but because § 1961 supposedly requires the district courts to apply the postjudgment interest *law* in effect at the judgment date.

This is too convoluted a reading of § 1961.[1] The Court reaches it because of its premise that "on the date of judgment expectations with respect to interest liability were fixed, so that the parties could make informed decisions about the cost and potential benefits of paying the judgment or seeking appeal." *Ante*, at 839. The Court fears it would be unfair to apply new § 1961 to a defendant that had already begun the process of challenging a money judgment because an important element defining the risk of appeal, the rate of postjudgment interest, changed upon the amendment of § 1961. But putting aside for the moment whether expectations about interest liability can ever settle before the end of litigation, I still do not understand why we should not apply new § 1961 to litigation in progress when we know that the principal reason for Congress' amendment of § 1961 was to change the risk of postjudgment litigation. The decision to appeal is not irrevocable. When new § 1961 took effect, Kaiser's motion for judgment notwithstanding the verdict was outstanding, and it was certainly within Kaiser's power then to offer a settlement based on its new perception of the risk in further proceedings. Kaiser also must have understood that Bonjorno would have contemplated an appeal if the District Court overturned or reduced the jury verdict. Nor was Kaiser unable to calculate the risk of protracting litigation under new § 1961 when it decided to seek certiorari.

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[1] To demonstrate why the Court's reading is implausible, one need only imagine a situation that might have arisen under the old version of § 1961. Under old § 1961, postjudgment interest was to be "calculated from the date of the entry of the judgment, at the rate allowed by State law." 28 U. S. C. § 1961 (1976 ed.). But what would have happened if, between the entry of judgment and the end of the litigation (or the calculation of postjudgment interest), the State had raised or lowered its legal rate of interest, or had abolished postjudgment interest altogether? Under the Court's reasoning, I take it, the federal courts would have been required under the plain language of § 1961 to apply the State's legal rate of interest in effect at the date of entry of judgment, even if the new state law expressly provided that it was to be applied to judgments entered prior to the effective date. This might contravene the Rules of Decision Act, 28 U. S. C. § 1652, which requires federal courts to follow state law in determining whether a state statute is operative. Cf. *Commissioners of Wicomico County* v. *Bancroft*, 203 U. S. 112, 118 (1906); *Town of South Ottawa* v. *Perkins*, 94 U. S. 260, 267 (1877).

Though the majority never uses the dreaded word, it clearly wants to say that Kaiser's right to a particular rate of postjudgment interest "vested" at the date of entry of judgment. Only the concept of "vestedness" fully explains the link that the majority makes between Kaiser's "fixed" expectations and its ability to make "informed" decisions. *Ante*, at 839. The majority overlooks the crucial point that Kaiser's liability for postjudgment interest could not be settled until the judgment against Kaiser became final. Until the end of litigation, a defendant must always evaluate the possibility that a judgment against it, and concomitantly the postjudgment interest that it must pay, may be vacated, decreased, *or increased* on appeal, in postjudgment proceedings before the District Court, or by a legislated change in the substantive law. (In this case, Kaiser's disastrous experience with its first attempt to overturn the jury verdict certainly made it aware of this possibility.) So whereas application of new § 1961 might have interfered with Kaiser's vested rights had Kaiser already paid the judgment and interest calculated under the old version of the statute, its expectations were not nearly so fixed before the case came to an end.[2]

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[2] This Court has held that the Contract Clause and Due Process Clause do not prevent legislatures from altering the statutory rate of postjudgment interest applicable to judgments that have not been satisfied. See *Missouri & Arkansas Lumber & Mining Co.* v. *Greenwood Dist. of Sebastian County, Ark.*, 249 U. S. 170 (1919); *Morley* v. *Lake Shore & Michigan & Southern R. Co.*, 146 U. S. 162 (1892); cf. *Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163 (1933); *League* v. *Texas*, 184 U. S. 156, 161 (1902). The Court does not say that it casts any doubt on these decisions. However, if the Court is correct that Kaiser's expectations about the rate of postjudgment interest truly became fixed upon entry of judgment, Congress might not have had the power to alter that rate even as to interest that accrued after the effective date of new § 1961. See *Morley*, *supra*, at

Nor do I agree that the statutory language providing for a delayed effective date means that "the amended version [of § 1961] cannot be applied before the effective date." *Ante*, at 839. Amended § 1961 was but one small part of the Federal Courts Improvement Act of 1982 (FCIA), Pub. L. 97-164, 96 Stat. 25, an omnibus law effecting significant changes in the administration of the federal courts, including the abolition of the old Court of Claims and Court of Customs and Patent Appeals and the creation of the new United States Claims Court and the United States Court of Appeals for the Federal Circuit.[3] Congress had to establish some date to mark the end of business for the old courts and the beginning for the new courts, and that date could not be the date of enactment of the statute, given the need to provide for court personnel and facilities. See, *e. g.*, Pub. L. 97-164, § 121, 96 Stat. 34-35 (authorizing United States Claims Court to appoint clerk, law clerks, secretaries, bailiffs, and messengers).[4]

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176 (Harlan, J., dissenting) (making this point). Kaiser might have had a constitutionally protected property right in the earlier postjudgment interest rate. Cf. *Logan* v. *Zimmerman Brush Co.*, 455 U. S. 422 (1982). When, in *Morley*, Justice Harlan argued that a plaintiff's right to New York's statutory rate of postjudgment interest had vested before the repeal of the interest statute, he stressed words in the old New York statute very similar to the words of § 1961 emphasized by the majority today, that every judgment should bear interest "*'from the time when it is entered.'*" 146 U. S., at 172 (emphasis added). Of course, Justice Harlan's argument was rejected by the Court.

[3] The effective date provision was § 402 of FCIA, Pub. L. 97-164, and was located in Title IV of that statute, labeled "Miscellaneous Provisions." See 96 Stat. 56-57. The postjudgment interest statute was amended by § 302 of FCIA, contained in a separate title governing "Jurisdiction and Procedure." See 96 Stat. 55-56.

[4] Congress may delay the effective date of a statute for many reasons having nothing to do with retroactivity, particularly if the statute is complex. For example, most parts of the Education Amendments of 1972, Pub. L. 92-318, 86 Stat. 235, took effect on July 1, 1972, eight days after enactment. Congress evidently delayed the effective date to conform the statute, which included appropriations provisions, to the federal fiscal year. See § 2(c)(1), 86 Stat. 236. Among the provisions with a delayed

Moreover, Congress is able to recognize a distinction that has eluded the majority: the difference between a statute *taking* effect on a certain date, in the sense that its provisions are not to be applied by a court before that date passes, and a statute *having* effect only after that date, in that its provisions may not be applied even to cases pending at that time. Indeed, Congress appears to have understood that the courts would presume that the provisions of FCIA would be applied to pending cases absent legislative direction to the contrary, because it specifically provided that the jurisdictional changes in FCIA should not be applied to certain classes of pending cases. In particular, § 403(e) of FCIA, 96 Stat. 58, provided that pending cases on appeal from the district courts to the courts of appeals should remain in the courts of appeals to which the appeals had originally been taken rather than be transferred to the Federal Circuit, as would have been otherwise required by the jurisdictional changes in FCIA. See, *e. g., Weisberg* v. *Department of Justice*, 246 U. S. App. D. C. 175, 763 F. 2d 1436 (1985).

In other statutes, Congress has recognized that there might be a problem in applying new law to pending cases and has provided for those cases expressly. When Congress eliminated most of this Court's appellate jurisdiction in 1988, it delayed the effective date of the jurisdictional changes, but it also provided specifically that those changes should not "affect the right to review or the manner of reviewing the judgment or decree of a court which was entered before such effective date." Pub. L. 100–352, § 7, 102 Stat. 664. And when Congress recently increased the jurisdictional amount for diversity cases, it specifically provided that "[t]he amendments . . . shall apply to any civil action *commenced* on or after the 180th day after the date of enactment of this title." Pub. L. 100–702, § 201(b), 102 Stat. 4646 (emphasis added).

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effective date was § 718, which authorized the award of attorney's fees in school desegregation litigation. This was the provision we held applicable to pending cases in *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974).

Congress thus understands that the mere inclusion of a delayed effective date will not necessarily be understood by the courts as precluding the application of the new statute to pending cases; when circumstances have so required, it has gone further and told the courts not to apply the statutory changes. This is not surprising, because as I discuss *infra*, at 868, absent legislative direction to the contrary or constitutional objections, federal courts have generally applied statutes to cases pending at their effective date, particularly if the statutes govern the administration of the courts.

I do not suggest that a delayed effective date should never indicate that a statute is not to be applied to pending cases. I cannot agree, however, that a delayed effective date in a statute as complex as FCIA, which effected many changes in judicial administration requiring a transition period and having nothing to do with postjudgment interest, is particularly instructive about the temporal operation of new § 1961.

II

Because the plain language of FCIA does not state whether amended § 1961 is to be applied to cases pending on the statute's effective date, it is necessary to apply the rules of construction that the Court has followed for almost two centuries in determining the temporal operation of federal statutes.

The Court discerns an "apparent tension" between the rule of *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974), and *United States* v. *Schooner Peggy*, 1 Cranch 103 (1801), requiring application of intervening statutory changes to pending cases, and the rule of *Bowen* v. *Georgetown University Hospital*, 488 U. S. 204 (1988), against retroactive application of statutes. *Ante*, at 837. The tension is more apparent than real, for the rule against retroactivity has little to do with this case. This case does not involve true retroaction, in the sense of the application of a change in law to overturn a judicial adjudication of rights that has already become final.

Cf. *Bowen, supra; Chicot County Drainage Dist.* v. *Baxter State Bank,* 308 U. S. 371 (1940).

Nor would application of amended § 1961 in this case require the courts to disturb a legal relation to which the parties have committed themselves, or that they have otherwise reached, in reliance on the state of the law prior to the amendment. Thus this case is unlike *Claridge Apartments Co.* v. *Commissioner,* 323 U. S. 141 (1944). There the Commissioner of Internal Revenue unsuccessfully argued for retroactive application of the 1938 Chandler Act, a bankruptcy statute that required the reduction of the basis of property transferred in the acquisition of an insolvent corporation to the fair market value of the property at the date of confirmation of a reorganization plan. At the time of the acquisition of the property involved in *Claridge Apartments,* the tax laws provided that the basis to the transferee would be the same as the (higher) adjusted basis in the hands of the transferor corporation. *Id.,* at 143, n. 2. Further, reorganization proceedings involving the transferor had closed before the Chandler Act became effective. In concluding that Congress intended the Chandler Act to apply only to reorganization proceedings pending on its effective date, the Court stressed that the Commissioner's construction would make the Chandler Act actually retroactive, in that it would require recalculation of definitely settled tax liabilities for past years. "Congress was not uprooting the whole tax past of reorganized debtors and their creditors." *Id.,* at 156.[5] No such uprooting is possible here; when amended § 1961 took effect, the parties were still contesting their obligations to each other. Application of amended § 1961 here does not require "altering the *past* legal consequences of past actions." *Bowen, supra,* at 219 (SCALIA, J., concurring).

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[5] For cases to similar effect, see *Miller* v. *United States,* 294 U. S. 435 (1935), where a 1930 regulation permitting recovery on war risk insurance for loss of a hand and an eye was not construed retroactively to allow recovery on an insurance policy that lapsed in 1919 for an injury sustained in 1918, and *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190 (1913), where a 1912 statute was not construed retroactively so as to recognize adverse possession against a railroad company, which under the prior statute had been immune from adverse possession claims.

What is even more important for present purposes is that in *Claridge Apartments* the Court also rejected the Tax Court's view that the Chandler Act did not apply to all tax years at issue in any reorganization proceedings pending at the statute's enactment, but only to 1938 and later tax years. Remarking that "the whole problem . . . was to give the Chandler Act as wide room as possible for future operation, notwithstanding the previous vesting of substantive rights or institution of bankruptcy or reorganization proceedings," 323 U. S., at 157–158, the Court had little difficulty in concluding that the changes in the tax laws applied even to reorganization "plans already confirmed in pending proceedings." *Id.,* at 158. The Court ordered application of the Chandler Act even to past tax years as long as the past tax liability was relevant to the ongoing reorganization of a debtor corporation. The Court then stated the relevant rule of construction that should be applied today: "It is the normal and usual function of legislation to discriminate between closed transactions and future ones or others pending but not completed." *Id.,* at 164. Not only is it the normal and usual function of legislation to so discriminate; it is our obligation to do so as well, to give congressional policy as declared in federal statutes the widest application consistent with constitutional guarantees.

The evolution of the presumption in favor of application of new laws to pending cases was comprehensively reviewed in *Bradley, supra,* at 711–715. It is a rule that we have applied with consistency. By this I do not mean that we have applied it mechanically. As with all choice-of-law rules, the *Bradley* rule requires evaluation of the implicated interests. Thus we cautioned in *Bradley* that neither that decision nor prior ones purported "to hold that courts must always thus apply new laws to pending cases in the absence of clear legislative direction to the contrary," 416 U. S., at 715, and we discussed at length the conditions that might counsel against application of a new statute to a pending case. *Id.*, at 717–721. But this is not a difficult case if the teachings of *Bradley* are observed.

Bradley noted that the concerns expressed in prior cases "relative to the possible working of an injustice [by applying a new statute] center upon (a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Id.*, at 717. As for the nature and identity of the parties here, it is true that this lawsuit is between private parties. But as *Bradley* makes clear, our analysis must be more discerning than just distinguishing between private and public entities; we must also look to the public interests implicated by the statutory change as well as the lawsuit itself. *Id.*, at 718–719.[6] Congress enacted amended § 1961 as part of a comprehensive reform of the federal courts and designed new § 1961 itself as an essential counterweight to the normal incentives for delay in litigation. Our readiness to apply new statutes to pending cases has arguably been at its peak when the statutes involved the administration or jurisdiction of the federal courts. See *Bradley, supra; Andrus* v. *Charlestone Stone Products Co.*, 436 U. S. 604, 607–608, n. 6 (1978); *United States* v. *Alabama*, 362 U. S. 602 (1960) *(per curiam); Dickinson Industrial Site, Inc.* v. *Cowan*, 309 U. S. 382 (1940).

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[6] Notwithstanding Chief Justice Marshall's remark that courts particularly resist application of newly enacted statutes "in mere private cases between individuals," *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801), some cases that have declined to apply newly enacted statutes have involved controversies between private parties and the Government, where the change in law would prejudice the rights of the private party and where there was a suggestion that the Government was using the change in law to disadvantage the private party unfairly. See, *e. g.*, *Greene* v. *United States*, 376 U. S. 149 (1964), which was similar to early cases such as the *Twenty Per Cent. Cases*, 20 Wall. 179 (1874), and *United States* v. *Heth*, 3 Cranch 399 (1806), in that it involved an attempt by the Government to evade an obligation to its employees that had plainly accrued under prior law. Cf. *Lynch* v. *United States*, 292 U. S. 571 (1934). Yet we have not hesitated to apply new federal statutes or regulations when the change in law was part of an important federal regulatory scheme, even in cases involving governmental entities. See, *e. g.*, *Bradley* v. *Richmond School Bd.*, 416 U. S. 696 (1974); *Thorpe* v. *Housing Authority of Durham*, 393 U. S. 268 (1969); *Reynolds* v. *United States*, 292 U. S. 443 (1934).

As for the nature of the rights, it is here that my disagreement with the majority is the sharpest. Much significance is ascribed to Kaiser's purportedly fixed expectations about the rate of postjudgment interest, see *ante*, at 839–840, but these expectations deserve little credit, for Kaiser was not entitled to assume much of anything about its interest rate. Postjudgment interest "rests solely upon statutory provision," *Pierce* v. *United States*, 255 U. S. 398, 406 (1921),[7] and both parties were on notice that Congress could alter the applicable interest rate if it wished. Furthermore, unlike the right to wages for services rendered, the right to postjudgment interest does not "vest" in discrete amounts as each day passes. The amount of postjudgment interest that a party will recover (or be required to pay) can never be known with certainty until the amount of the underlying judgment is known with certainty, and that amount in turn cannot be definitively ascertained until the process of appeal is completed. Indeed, Bonjorno's right to postjudgment interest would have evaporated had the Court of Appeals reversed its judgment against Kaiser. Thus one cannot speak meaningfully of a "matured" right to postjudgment interest before the amount of the judgment is finally established.[8]

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[7] For the same reason, I do agree with the majority that federal courts have no discretion to award postjudgment interest at a rate higher than that prescribed by statute. *Ante*, at 840. *Texas* v. *New Mexico*, 482 U. S. 124, 132–133, n. 8 (1987), is distinguishable because the case arose under our original jurisdiction.

[8] *Reynolds* v. *United States*, 292 U. S. 443 (1934), was analytically similar to this case. There a veteran argued that the hospital for the insane where he was committed was precluded from deducting amounts for room

Bradley last requires us to consider "the nature of the impact of the change in law upon existing rights, or, to state it another way, . . . the possibility that new and unanticipated obligations may be imposed upon a party without notice or opportunity to be heard." 416 U. S., at 720. There is no claim here that Kaiser was unaware that its obligation for postjudgment interest could be altered during the pendency of litigation. Cf. *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill,* 281 U. S. 673 (1930). And Kaiser could have protected itself from fluctuation of the postjudgment interest rate by depositing the amount of the judgment with the District Court. See Fed. Rule Civ. Proc. 67. Nor did the amendment of § 1961 create a new substantive cause of action or eliminate a substantive defense in a way that would cause hardship to Kaiser. Cf. *Union Pacific R. Co.* v. *Laramie Stock Yards Co.,* 231 U. S. 190 (1913).

Finally, a more general word must be said about the element of "manifest injustice" that *Bradley* addressed. It is difficult to see how manifest injustice could be worked except by refusing to apply amended § 1961 to this case. As a result of the Court's decision today, Bonjorno is remitted to a postjudgment interest rate greatly lower than its cost of money during the pendency of the litigation, while Kaiser, an adjudicated violator of the antitrust laws, is permitted to escape the consequences of protracting litigation. This was precisely the result that Congress intended to prevent by amending § 1961.

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and board from his war pension, which had been paid to the hospital by the Government during his confinement. Congress had passed a statute to that effect during his confinement. The Court held that the statute precluded the hospital from deducting even amounts allocable to the veteran's confinement before the passage of the statute, because on the facts of the case "[t]he liability for board arose from *continuous charges,* beginning before the proviso was passed and ending at the time of petitioner's discharge." *Id.,* at 448 (emphasis added). This case is therefore more like *Reynolds* than the *Twenty Per Cent. Cases, supra,* in which the Government owed its employees money for services already rendered and completed.

III

I agree with the majority that the plain language of § 1961 compels us to conclude that postjudgment interest runs from the date of the entry of judgment, not the date of a jury verdict. *Ante*, at 835.

I also agree with the majority that postjudgment interest in this case did not begin to accrue upon entry of the August 22, 1979, judgment. Because the District Court's subsequent grant of a new trial was never overturned, we must accept the District Court's determination that the August 22, 1979, judgment on damages was not supported by the evidence, and that damages were not ascertained until the December 2, 1981, verdict. The Court's holding is necessarily limited to the facts of this case. The majority does not state whether August 22, 1979, would have been the proper commencement date for accrual of postjudgment interest had Bonjorno successfully appealed the order granting a new trial.[9] Cf. *Turner* v. *Japan Lines, Ltd.*, 702 F. 2d 752 (CA9 1983). Nor does the Court state any rule applicable to various other fact patterns not before us but commonly encountered by the lower courts, *e. g.*, where the district court correctly ascertains total damages but improperly apportions them among the parties, *Brooks* v. *United States*, 757 F. 2d 734 (CA5 1985), or where a judgment entered after a second trial necessarily cannot include interest accrued after the end of the first trial, *Handgards, Inc.* v. *Ethicon, Inc.*, 743 F. 2d 1282 (CA9 1984), cert. denied, 469 U. S. 1190 (1985), or where an interest award is reduced on appeal and a new judgment is entered on remand, *Perkins* v. *Standard Oil Co. of Cal.*, 487 F. 2d 672 (CA9 1973).

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[9] Bonjorno of course could not challenge the District Court's order granting a new trial on damages until after the retrial, see, *e. g.*, *Juneau Square Corp.* v. *First Wisconsin National Bank of Milwaukee*, 624 F. 2d 798, 806 (CA7), cert. denied, 449 U. S. 1013 (1980), and had little incentive to challenge that order after the second trial, given the much more favorable outcome of the retrial. In many cases, however, a party appealing a judgment entered after a new trial will prefer the outcome of the first trial and will argue that the first verdict should be reinstated.

I respectfully dissent.

EMPLOYMENT DIVISION, DEPARTMENT OF HUMAN RESOURCES OF OREGON, ET AL. *v.* SMITH ET AL.

CERTIORARI TO THE SUPREME COURT OF OREGON

No. 88–1213. Argued November 6, 1989—Decided April 17, 1990

Respondents Smith and Black were fired by a private drug rehabilitation organization because they ingested peyote, a hallucinogenic drug, for sacramental purposes at a ceremony of their Native American Church. Their applications for unemployment compensation were denied by the State of Oregon under a state law disqualifying employees discharged for work-related "misconduct." Holding that the denials violated respondents' First Amendment free exercise rights, the State Court of Appeals reversed. The State Supreme Court affirmed, but this Court vacated the judgment and remanded for a determination whether sacramental peyote use is proscribed by the State's controlled substance law, which makes it a felony to knowingly or intentionally possess the drug. Pending that determination, the Court refused to decide whether such use is protected by the Constitution. On remand, the State Supreme Court held that sacramental peyote use violated, and was not excepted from, the state-law prohibition, but concluded that that prohibition was invalid under the Free Exercise Clause.

Held: The Free Exercise Clause permits the State to prohibit sacramental peyote use and thus to deny unemployment benefits to persons discharged for such use. Pp. 876–890.

(a) Although a State would be "prohibiting the free exercise [of religion]" in violation of the Clause if it sought to ban the performance of (or abstention from) physical acts solely because of their religious motivation, the Clause does not relieve an individual of the obligation to comply with a law that incidentally forbids (or requires) the performance of an act that his religious belief requires (or forbids) if the law is not specifically directed to religious practice and is otherwise constitutional as applied to those who engage in the specified act for nonreligious reasons. See, *e. g., Reynolds* v. *United States,* 98 U. S. 145, 166–167. The only decisions in which this Court has held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action are distinguished on the ground that they involved not the Free Exercise Clause alone, but that Clause in conjunction with other constitutional protections. See, *e. g., Cantwell* v. *Connecticut,* 310 U. S. 296, 304–307; *Wisconsin* v. *Yoder,* 406 U. S. 205. Pp. 876–882.

(b) Respondents' claim for a religious exemption from the Oregon law cannot be evaluated under the balancing test set forth in the line of cases following *Sherbert* v. *Verner,* 374 U. S. 398, 402–403, whereby governmental actions that substantially burden a religious practice must be justified by a "compelling governmental interest." That test was developed in a context—unemployment compensation eligibility rules—that lent itself to individualized governmental assessment of the reasons for the relevant conduct. The test is inapplicable to an across-the-board criminal prohibition on a particular form of conduct. A holding to the contrary would create an extraordinary right to ignore generally applicable laws that are not supported by "compelling governmental interest" on the basis of religious belief. Nor could such a right be limited to situations in which the conduct prohibited is "central" to the individual's religion, since that would enmesh judges in an impermissible inquiry into the centrality of particular beliefs or practices to a faith. Cf. *Hernandez* v. *Commissioner,* 490 U. S. 680, 699. Thus, although it is constitutionally permissible to exempt sacramental peyote use from the operation of drug laws, it is not constitutionally required. Pp. 882–890.

307 Ore. 68, 763 P. 2d 146, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, STEVENS, and KENNEDY, JJ., joined. O'CONNOR, J., filed an opinion concurring in the judgment, in Parts I and II of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined without concurring in the judgment, *post,* p. 891. BLACKMUN, J., filed a dissenting opinion, in which BRENNAN and MARSHALL, JJ., joined, *post,* p. 907.

Dave Frohnmayer, Attorney General of Oregon, argued the cause for petitioners. With him on the briefs were *James E. Mountain, Jr.,* Deputy Attorney General, *Virginia L. Linder,* Solicitor General, and *Michael D. Reynolds,* Assistant Solicitor General.

Craig J. Dorsay argued the cause and filed briefs for respondents.*

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*Briefs of *amici curiae* urging affirmance were filed for the American Civil Liberties Union et al. by *Steven R. Shapiro* and *John A. Powell;* for the American Jewish Congress by *Amy Adelson, Lois C. Waldman,* and *Marc D. Stern;* for the Association on American Indian Affairs et al. by *Steven C. Moore* and *Jack Trope;* and for the Council on Religious Freedom by *Lee Boothby* and *Robert W. Nixon.*

JUSTICE SCALIA delivered the opinion of the Court.

This case requires us to decide whether the Free Exercise Clause of the First Amendment permits the State of Oregon to include religiously inspired peyote use within the reach of its general criminal prohibition on use of that drug, and thus permits the State to deny unemployment benefits to persons dismissed from their jobs because of such religiously inspired use.

I

Oregon law prohibits the knowing or intentional possession of a "controlled substance" unless the substance has been prescribed by a medical practitioner. Ore. Rev. Stat. § 475.992(4) (1987). The law defines "controlled substance" as a drug classified in Schedules I through V of the Federal Controlled Substances Act, 21 U. S. C. §§ 811–812, as modified by the State Board of Pharmacy. Ore. Rev. Stat. § 475.005(6) (1987). Persons who violate this provision by possessing a controlled substance listed on Schedule I are "guilty of a Class B felony." § 475.992(4)(a). As compiled by the State Board of Pharmacy under its statutory authority, see § 475.035, Schedule I contains the drug peyote, a hallucinogen derived from the plant *Lophophora williamsii Lemaire*. Ore. Admin. Rule 855–80–021(3)(s) (1988).

Respondents Alfred Smith and Galen Black (hereinafter respondents) were fired from their jobs with a private drug rehabilitation organization because they ingested peyote for sacramental purposes at a ceremony of the Native American Church, of which both are members. When respondents applied to petitioner Employment Division (hereinafter petitioner) for unemployment compensation, they were determined to be ineligible for benefits because they had been discharged for work-related "misconduct." The Oregon Court of Appeals reversed that determination, holding that the denial of benefits violated respondents' free exercise rights under the First Amendment.

On appeal to the Oregon Supreme Court, petitioner argued that the denial of benefits was permissible because respondents' consumption of peyote was a crime under Oregon law. The Oregon Supreme Court reasoned, however, that the criminality of respondents' peyote use was irrelevant to resolution of their constitutional claim—since the purpose of the "misconduct" provision under which respondents had been disqualified was not to enforce the State's criminal laws but to preserve the financial integrity of the compensation fund, and since that purpose was inadequate to justify the burden that disqualification imposed on respondents' religious practice. Citing our decisions in *Sherbert* v. *Verner*, 374 U. S. 398 (1963), and *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707 (1981), the court concluded that respondents were entitled to payment of unemployment benefits. *Smith* v. *Employment Div., Dept. of Human Resources*, 301 Ore. 209, 217–219, 721 P. 2d 445, 449–450 (1986). We granted certiorari. 480 U. S. 916 (1987).

Before this Court in 1987, petitioner continued to maintain that the illegality of respondents' peyote consumption was relevant to their constitutional claim. We agreed, concluding that "if a State has prohibited through its criminal laws certain kinds of religiously motivated conduct without violating the First Amendment, it certainly follows that it may impose the lesser burden of denying unemployment compensation benefits to persons who engage in that conduct." *Employment Div., Dept. of Human Resources of Oregon* v. *Smith*, 485 U. S. 660, 670 (1988) *(Smith I)*. We noted, however, that the Oregon Supreme Court had not decided whether respondents' sacramental use of peyote was in fact proscribed by Oregon's controlled substance law, and that this issue was a matter of dispute between the parties. Being "uncertain about the legality of the religious use of peyote in Oregon," we determined that it would not be "appropriate for us to decide whether the practice is protected by the Federal Constitution." *Id.*, at 673. Accordingly, we vacated the judgment of the Oregon Supreme Court and remanded for further proceedings. *Id.*, at 674.

On remand, the Oregon Supreme Court held that respondents' religiously inspired use of peyote fell within the prohibition of the Oregon statute, which "makes no exception for the sacramental use" of the drug. 307 Ore. 68, 72–73, 763 P. 2d 146, 148 (1988). It then considered whether that prohibition was valid under the Free Exercise Clause, and concluded that it was not. The court therefore reaffirmed its previous ruling that the State could not deny unemployment benefits to respondents for having engaged in that practice. We again granted certiorari. 489 U. S. 1077 (1989).

II

Respondents' claim for relief rests on our decisions in *Sherbert* v. *Verner, supra, Thomas* v. *Review Bd. of Indiana Employment Security Div., supra,* and *Hobbie* v. *Unemployment Appeals Comm'n of Florida,* 480 U. S. 136 (1987), in which we held that a State could not condition the availability of unemployment insurance on an individual's willingness to forgo conduct required by his religion. As we observed in *Smith I,* however, the conduct at issue in those cases was not prohibited by law. We held that distinction to be critical, for "if Oregon does prohibit the religious use of peyote, and if that prohibition is consistent with the Federal Constitution, there is no federal right to engage in that conduct in Oregon," and "the State is free to withhold unemployment compensation from respondents for engaging in work-related misconduct, despite its religious motivation." 485 U. S., at 672. Now that the Oregon Supreme Court has confirmed that Oregon does prohibit the religious use of peyote, we proceed to consider whether that prohibition is permissible under the Free Exercise Clause.

A

The Free Exercise Clause of the First Amendment, which has been made applicable to the States by incorporation into the Fourteenth Amendment, see *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof* . . . ." U. S. Const., Amdt. 1 (emphasis added). The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such." *Sherbert* v. *Verner*, *supra*, at 402. The government may not compel affirmation of religious belief, see *Torcaso* v. *Watkins*, 367 U. S. 488 (1961), punish the expression of religious doctrines it believes to be false, *United States* v. *Ballard*, 322 U. S. 78, 86–88 (1944), impose special disabilities on the basis of religious views or religious status, see *McDaniel* v. *Paty*, 435 U. S. 618 (1978); *Fowler* v. *Rhode Island*, 345 U. S. 67, 69 (1953); cf. *Larson* v. *Valente*, 456 U. S. 228, 245 (1982), or lend its power to one or the other side in controversies over religious authority or dogma, see *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S. 440, 445–452 (1969); *Kedroff* v. *St. Nicholas Cathedral*, 344 U. S. 94, 95–119 (1952); *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U. S. 696, 708–725 (1976).

But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.

Respondents in the present case, however, seek to carry the meaning of "prohibiting the free exercise [of religion]" one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons. They assert, in other words, that "prohibiting the free exercise [of religion]" includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as "prohibiting the free exercise [of religion]" by those citizens who believe support of organized government to be sinful, than it is to regard the same tax as "abridging the freedom . . . of the press" of those publishing companies that must pay the tax as a condition of staying in business. It is a permissible reading of the text, in the one case as in the other, to say that if prohibiting the exercise of religion (or burdening the activity of printing) is not the object of the tax but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended. Compare *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969) (upholding application of antitrust laws to press), with *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250–251 (1936) (striking down license tax applied only to newspapers with weekly circulation above a specified level); see generally *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U. S. 575, 581 (1983).

Our decisions reveal that the latter reading is the correct one. We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate. On the contrary, the record of more than a century of our free exercise jurisprudence contradicts that proposition. As described succinctly by Justice Frankfurter in *Minersville School Dist. Bd. of Ed.* v. *Gobitis,* 310 U. S. 586, 594–595 (1940): "Conscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs. The mere possession of religious convictions which contradict the relevant concerns of a political society does not relieve the citizen from the discharge of political responsibilities (footnote omitted)." We first had occasion to assert that principle in *Reynolds* v. *United States,* 98 U. S. 145 (1879), where we rejected the claim that criminal laws against polygamy could not be constitutionally applied to those whose religion commanded the practice. "Laws," we said, "are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself." *Id.,* at 166–167.

Subsequent decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *United States* v. *Lee,* 455 U. S. 252, 263, n. 3 (1982) (STEVENS, J., concurring in judgment); see *Minersville School Dist. Bd. of Ed.* v. *Gobitis, supra,* at 595 (collecting cases). In *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), we held that a mother could be prosecuted under the child labor laws for using her children to dispense literature in the streets, her religious motivation notwithstanding. We found no constitutional infirmity in "excluding [these children] from doing there what no other children may do." *Id.*, at 171. In *Braunfeld* v. *Brown*, 366 U. S. 599 (1961) (plurality opinion), we upheld Sunday-closing laws against the claim that they burdened the religious practices of persons whose religions compelled them to refrain from work on other days. In *Gillette* v. *United States*, 401 U. S. 437, 461 (1971), we sustained the military Selective Service System against the claim that it violated free exercise by conscripting persons who opposed a particular war on religious grounds.

Our most recent decision involving a neutral, generally applicable regulatory law that compelled activity forbidden by an individual's religion was *United States* v. *Lee*, 455 U. S., at 258–261. There, an Amish employer, on behalf of himself and his employees, sought exemption from collection and payment of Social Security taxes on the ground that the Amish faith prohibited participation in governmental support programs. We rejected the claim that an exemption was constitutionally required. There would be no way, we observed, to distinguish the Amish believer's objection to Social Security taxes from the religious objections that others might have to the collection or use of other taxes. "If, for example, a religious adherent believes war is a sin, and if a certain percentage of the federal budget can be identified as devoted to war-related activities, such individuals would have a similarly valid claim to be exempt from paying that percentage of the income tax. The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.*, at 260. Cf. *Hernandez* v. *Commissioner*, 490 U. S. 680 (1989) (rejecting free exercise challenge to payment of income taxes alleged to make religious activities more difficult).

The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press, see *Cantwell* v. *Connecticut*, 310 U. S., at 304–307 (invalidating a licensing system for religious and charitable solicitations under which the administrator had discretion to deny a license to any cause he deemed nonreligious); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943) (invalidating a flat tax on solicitation as applied to the dissemination of religious ideas); *Follett* v. *McCormick*, 321 U. S. 573 (1944) (same), or the right of parents, acknowledged in *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925), to direct the education of their children, see *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972) (invalidating compulsory school-attendance laws as applied to Amish parents who refused on religious grounds to send their children to school).[1]

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[1] Both lines of cases have specifically adverted to the non-free-exercise principle involved. *Cantwell*, for example, observed that "[t]he fundamental law declares the interest of the United States that the free exercise of religion be not prohibited and that freedom to communicate information and opinion be not abridged." 310 U. S., at 307. *Murdock* said:

"We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. . . . Those who can deprive religious groups of their colporteurs can take from them a part of the vital power of the press which has survived from the Reformation." 319 U. S., at 112.

Yoder said that "the Court's holding in *Pierce* stands as a charter of the rights of parents to direct the religious upbringing of their children. And, when the interests of parenthood are combined with a free exercise claim of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment." 406 U. S., at 233.

Some of our cases prohibiting compelled expression, decided exclusively upon free speech grounds, have also involved freedom of religion, cf. *Wooley* v. *Maynard,* 430 U. S. 705 (1977) (invalidating compelled display of a license plate slogan that offended individual religious beliefs); *West Virginia Bd. of Education* v. *Barnette,* 319 U. S. 624 (1943) (invalidating compulsory flag salute statute challenged by religious objectors). And it is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns. Cf. *Roberts* v. *United States Jaycees,* 468 U. S. 609, 622 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward those ends were not also guaranteed").

The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity or parental right. Respondents urge us to hold, quite simply, that when otherwise prohibitable conduct is accompanied by religious convictions, not only the convictions but the conduct itself must be free from governmental regulation. We have never held that, and decline to do so now. There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls. "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." *Gillette* v. *United States, supra,* at 461.

B

Respondents argue that even though exemption from generally applicable criminal laws need not automatically be extended to religiously motivated actors, at least the claim for a religious exemption must be evaluated under the balancing test set forth in *Sherbert* v. *Verner,* 374 U. S. 398 (1963). Under the *Sherbert* test, governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest. See *id.,* at 402–403; see also *Hernandez* v. *Commissioner,* 490 U. S., at 699. Applying that test we have, on three occasions, invalidated state unemployment compensation rules that conditioned the availability of benefits upon an applicant's willingness to work under conditions forbidden by his religion. See *Sherbert* v. *Verner, supra; Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707 (1981); *Hobbie* v. *Unemployment Appeals Comm'n of Florida,* 480 U. S. 136 (1987). We have never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation. Although we have sometimes purported to apply the *Sherbert* test in contexts other than that, we have always found the test satisfied, see *United States* v. *Lee,* 455 U. S. 252 (1982); *Gillette* v. *United States,* 401 U. S. 437 (1971). In recent years we have abstained from applying the *Sherbert* test (outside the unemployment compensation field) at all. In *Bowen* v. *Roy,* 476 U. S. 693 (1986), we declined to apply *Sherbert* analysis to a federal statutory scheme that required benefit applicants and recipients to provide their Social Security numbers. The plaintiffs in that case asserted that it would violate their religious beliefs to obtain and provide a Social Security number for their daughter. We held the statute's application to the plaintiffs valid regardless of whether it was necessary to effectuate a compelling interest. See 476 U. S., at 699–701. In *Lyng* v. *Northwest Indian Cemetery Protective Assn.,* 485 U. S. 439 (1988), we declined to apply *Sherbert* analysis to the Government's logging and road construction activities on lands used for religious purposes by several Native American Tribes, even though it was undisputed that the activities "could have devastating effects on traditional Indian religious practices," 485 U. S., at 451.

In *Goldman* v. *Weinberger*, 475 U. S. 503 (1986), we rejected application of the *Sherbert* test to military dress regulations that forbade the wearing of yarmulkes. In *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342 (1987), we sustained, without mentioning the *Sherbert* test, a prison's refusal to excuse inmates from work requirements to attend worship services.

Even if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable criminal law. The *Sherbert* test, it must be recalled, was developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. As a plurality of the Court noted in *Roy*, a distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment: "The statutory conditions [in *Sherbert* and *Thomas*] provided that a person was not eligible for unemployment compensation benefits if, 'without good cause,' he had quit work or refused available work. The 'good cause' standard created a mechanism for individualized exemptions." *Bowen* v. *Roy*, *supra*, at 708 (opinion of Burger, C. J., joined by Powell and REHNQUIST, JJ.). See also *Sherbert*, *supra*, at 401, n. 4 (reading state unemployment compensation law as allowing benefits for unemployment caused by at least some "personal reasons"). As the plurality pointed out in *Roy*, our decisions in the unemployment cases stand for the proposition that where the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of "religious hardship" without compelling reason. *Bowen* v. *Roy*, *supra*, at 708.

Whether or not the decisions are that limited, they at least have nothing to do with an across-the-board criminal prohibition on a particular form of conduct. Although, as noted earlier, we have sometimes used the *Sherbert* test to analyze free exercise challenges to such laws, see *United States* v.

Lee, supra, at 257–260; *Gillette* v. *United States, supra,* at 462, we have never applied the test to invalidate one. We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." *Lyng, supra,* at 451. To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself," *Reynolds* v. *United States,* 98 U. S., at 167—contradicts both constitutional tradition and common sense.[2]

The "compelling government interest" requirement seems benign, because it is familiar from other fields. But using it as the standard that must be met before the government may accord different treatment on the basis of race, see, *e. g.*,

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[2] JUSTICE O'CONNOR seeks to distinguish *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439 (1988), and *Bowen* v. *Roy*, 476 U. S. 693 (1986), on the ground that those cases involved the government's conduct of "its own internal affairs," which is different because, as Justice Douglas said in *Sherbert*, "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'" *Post,* at 900 (O'CONNOR, J., concurring in judgment), quoting *Sherbert* v. *Verner*, 374 U. S. 398, 412 (1963) (Douglas, J., concurring). But since Justice Douglas voted with the majority in *Sherbert*, that quote obviously envisioned that what "the government cannot do to the individual" includes not just the prohibition of an individual's freedom of action through criminal laws but also the running of its programs (in *Sherbert*, state unemployment compensation) in such fashion as to harm the individual's religious interests. Moreover, it is hard to see any reason in principle or practicality why the government should have to tailor its health and safety laws to conform to the diversity of religious belief, but should not have to tailor its management of public lands, *Lyng, supra*, or its administration of welfare programs, *Roy, supra*.

Palmore v. *Sidoti*, 466 U. S. 429, 432 (1984), or before the government may regulate the content of speech, see, *e. g.*, *Sable Communications of California* v. *FCC*, 492 U. S. 115, 126 (1989), is not remotely comparable to using it for the purpose asserted here. What it produces in those other fields—equality of treatment and an unrestricted flow of contending speech—are constitutional norms; what it would produce here—a private right to ignore generally applicable laws—is a constitutional anomaly.[3]

Nor is it possible to limit the impact of respondents' proposal by requiring a "compelling state interest" only when the conduct prohibited is "central" to the individual's religion. Cf. *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S., at 474–476 (BRENNAN, J., dissenting). It is no more appropriate for judges to determine the "centrality" of religious beliefs before applying a "compelling interest" test in the free exercise field, than it would be for them to determine the "importance" of ideas before applying the "compelling interest" test in the free speech field. What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is "central" to his personal faith? Judging the centrality of different religious practices is akin to the unacceptable "business of evaluating the relative merits of differing religious claims." *United States* v. *Lee*, 455 U. S., at 263 n. 2 (STEVENS, J., concurring). As we reaffirmed only last Term, "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds." *Hernandez* v. *Commissioner*, 490 U. S., at 699. Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim. See, *e. g., Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S., at 716; *Presbyterian Church in U. S.* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U. S., at 450; *Jones* v. *Wolf*, 443 U. S. 595, 602–606 (1979); *United States* v. *Ballard*, 322 U. S. 78, 85–87 (1944).[4]

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[3] JUSTICE O'CONNOR suggests that "[t]here is nothing talismanic about neutral laws of general applicability," and that all laws burdening religious practices should be subject to compelling-interest scrutiny because "the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a 'constitutional nor[m],' not an 'anomaly.'" *Post*, at 901 (opinion concurring in judgment). But this comparison with other fields supports, rather than undermines, the conclusion we draw today. Just as we subject to the most exacting scrutiny laws that make classifications based on race, see *Palmore* v. *Sidoti*, 466 U. S. 429 (1984), or on the content of speech, see *Sable Communications of California* v. *FCC*, 492 U. S. 115 (1989), so too we strictly scrutinize governmental classifications based on religion, see *McDaniel* v. *Paty*, 435 U. S. 618 (1978); see also *Torcaso* v. *Watkins*, 367 U. S. 488 (1961). But we have held that race-neutral laws that have the *effect* of disproportionately disadvantaging a particular racial group do not thereby become subject to compelling-interest analysis under the Equal Protection Clause, see *Washington* v. *Davis*, 426 U. S. 229 (1976) (police employment examination); and we have held that generally applicable laws unconcerned with regulating speech that have the *effect* of interfering with speech do not thereby become subject to compelling-interest analysis under the First Amendment, see *Citizen Publishing Co.* v. *United States*, 394 U. S. 131, 139 (1969) (antitrust laws). Our conclusion that generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest is the only approach compatible with these precedents.

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[4] While arguing that we should apply the compelling interest test in this case, JUSTICE O'CONNOR nonetheless agrees that "our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue," *post*, at 906–907 (opinion concurring in judgment). This means, presumably, that compelling-interest scrutiny must be applied to generally applicable laws that regulate or prohibit *any* religiously motivated activity, no matter how unimportant to the claimant's religion. Earlier in her opinion, however, JUSTICE O'CONNOR appears to contradict this, saying that the proper approach is "to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling." *Post*, at 899. "Constitutionally significant burden" would seem to be "cen-

If the "compelling interest" test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded. Moreover, if "compelling interest" really means what it says (and watering it down here would subvert its rigor in the other fields where it is applied), many laws will not meet the test. Any society adopting such a system would be courting anarchy, but that danger increases in direct proportion to the society's diversity of religious beliefs, and its determination to coerce or suppress none of them. Precisely because "we are a cosmopolitan nation made up of people of almost every conceivable religious preference," *Braunfeld* v. *Brown*, 366 U. S., at 606, and precisely because we value and protect that religious divergence, we cannot afford the luxury of deeming *presumptively invalid*, as applied to the religious objector, every regulation of conduct that does not protect an interest of the highest order. The rule respondents favor would open the prospect of constitutionally required religious exemptions from civic obligations of almost every conceivable kind—ranging from

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trality" under another name. In any case, dispensing with a "centrality" inquiry is utterly unworkable. It would require, for example, the same degree of "compelling state interest" to impede the practice of throwing rice at church weddings as to impede the practice of getting married in church. There is no way out of the difficulty that, if general laws are to be subjected to a "religious practice" exception, *both* the importance of the law at issue *and* the centrality of the practice at issue must reasonably be considered.

Nor is this difficulty avoided by JUSTICE BLACKMUN's assertion that "although . . . courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is 'central' to the religion, . . . I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion." *Post*, at 919 (dissenting opinion). As JUSTICE BLACKMUN's opinion proceeds to make clear, inquiry into "severe impact" is no different from inquiry into centrality. He has merely substituted for the question "How important is X to the religious adherent?" the question "How great will be the harm to the religious adherent if X is taken away?" There is no material difference.

compulsory military service, see, *e. g., Gillette* v. *United States*, 401 U. S. 437 (1971), to the payment of taxes, see, *e. g., United States* v. *Lee, supra;* to health and safety regulation such as manslaughter and child neglect laws, see, *e. g., Funkhouser* v. *State*, 763 P. 2d 695 (Okla. Crim. App. 1988), compulsory vaccination laws, see, *e. g., Cude* v. *State*, 237 Ark. 927, 377 S. W. 2d 816 (1964), drug laws, see, *e. g., Olsen* v. *Drug Enforcement Administration*, 279 U. S. App. D. C. 1, 878 F. 2d 1458 (1989), and traffic laws, see *Cox* v. *New Hampshire*, 312 U. S. 569 (1941); to social welfare legislation such as minimum wage laws, see *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290 (1985), child labor laws, see *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), animal cruelty laws, see, *e. g., Church of the Lukumi Babalu Aye Inc.* v. *City of Hialeah*, 723 F. Supp. 1467 (SD Fla. 1989), cf. *State* v. *Massey*, 229 N. C. 734, 51 S. E. 2d 179, appeal dism'd, 336 U. S. 942 (1949), environmental protection laws, see *United States* v. *Little*, 638 F. Supp. 337 (Mont. 1986), and laws providing for equality of opportunity for the races, see, *e. g., Bob Jones University* v. *United States*, 461 U. S. 574, 603–604 (1983). The First Amendment's protection of religious liberty does not require this.[5]

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[5] JUSTICE O'CONNOR contends that the "parade of horribles" in the text only "demonstrates . . . that courts have been quite capable of . . . strik[ing] sensible balances between religious liberty and competing state interests." *Post*, at 902 (opinion concurring in judgment). But the cases we cite have struck "sensible balances" only because they have all applied the general laws, despite the claims for religious exemption. In any event, JUSTICE O'CONNOR mistakes the purpose of our parade: it is not to suggest that courts would necessarily permit harmful exemptions from these laws (though they might), but to suggest that courts would constantly be in the business of determining whether the "severe impact" of various laws on religious practice (to use JUSTICE BLACKMUN's terminology, *post*, at 919) or the "constitutiona[l] significan[ce]" of the "burden on the specific plaintiffs" (to use JUSTICE O'CONNOR's terminology, *post*, at 899) suffices to permit us to confer an exemption. It is a parade of horribles because it is horrible to

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well. It is therefore not surprising that a number of States have made an exception to their drug laws for sacramental peyote use. See, *e. g.*, Ariz. Rev. Stat. Ann. §§13–3402(B)(1)–(3) (1989); Colo. Rev. Stat. §12–22–317(3) (1985); N. M. Stat. Ann. §30–31–6(D) (Supp. 1989). But to say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts. It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

* * *

Because respondents' ingestion of peyote was prohibited under Oregon law, and because that prohibition is constitutional, Oregon may, consistent with the Free Exercise Clause, deny respondents unemployment compensation when their dismissal results from use of the drug. The decision of the Oregon Supreme Court is accordingly reversed.

It is so ordered.

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contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice.

JUSTICE O'CONNOR, with whom JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join as to Parts I and II, concurring in the judgment.*

Although I agree with the result the Court reaches in this case, I cannot join its opinion. In my view, today's holding dramatically departs from well-settled First Amendment jurisprudence, appears unnecessary to resolve the question presented, and is incompatible with our Nation's fundamental commitment to individual religious liberty.

I

At the outset, I note that I agree with the Court's implicit determination that the constitutional question upon which we granted review—whether the Free Exercise Clause protects a person's religiously motivated use of peyote from the reach of a State's general criminal law prohibition—is properly presented in this case. As the Court recounts, respondents Alfred Smith and Galen Black (hereinafter respondents) were denied unemployment compensation benefits because their sacramental use of peyote constituted work-related "misconduct," not because they violated Oregon's general criminal prohibition against possession of peyote. We held, however, in *Employment Div., Dept. of Human Resources of Oregon* v. *Smith,* 485 U. S. 660 (1988) *(Smith I),* that whether a State may, consistent with federal law, deny unemployment compensation benefits to persons for their religious use of peyote depends on whether the State, as a matter of state law, has criminalized the underlying conduct. See *id.*, at 670–672. The Oregon Supreme Court, on remand from this Court, concluded that "the Oregon statute against possession of controlled substances, which include peyote, makes no exception for the sacramental use of peyote." 307 Ore. 68, 72–73, 763 P. 2d 146, 148 (1988) (footnote omitted).

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*Although JUSTICE BRENNAN, JUSTICE MARSHALL, and JUSTICE BLACKMUN join Parts I and II of this opinion, they do not concur in the judgment.

Respondents contend that, because the Oregon Supreme Court declined to decide whether the Oregon Constitution prohibits criminal prosecution for the religious use of peyote, see *id.*, at 73, n. 3, 763 P. 2d, at 148, n. 3, any ruling on the federal constitutional question would be premature. Respondents are of course correct that the Oregon Supreme Court may eventually decide that the Oregon Constitution requires the State to provide an exemption from its general criminal prohibition for the religious use of peyote. Such a decision would then reopen the question whether a State may nevertheless deny unemployment compensation benefits to claimants who are discharged for engaging in such conduct. As the case comes to us today, however, the Oregon Supreme Court has plainly ruled that Oregon's prohibition against possession of controlled substances does not contain an exemption for the religious use of peyote. In light of our decision in *Smith I*, which makes this finding a "necessary predicate to a correct evaluation of respondents' federal claim," 485 U. S., at 672, the question presented and addressed is properly before the Court.

II

The Court today extracts from our long history of free exercise precedents the single categorical rule that "if prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Ante*, at 878 (citations omitted). Indeed, the Court holds that where the law is a generally applicable criminal prohibition, our usual free exercise jurisprudence does not even apply. *Ante*, at 884. To reach this sweeping result, however, the Court must not only give a strained reading of the First Amendment but must also disregard our consistent application of free exercise doctrine to cases involving generally applicable regulations that burden religious conduct.

A

The Free Exercise Clause of the First Amendment commands that "Congress shall make no law . . . prohibiting the free exercise [of religion]." In *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940), we held that this prohibition applies to the States by incorporation into the Fourteenth Amendment and that it categorically forbids government regulation of religious beliefs. *Id.*, at 303. As the Court recognizes, however, the "free *exercise*" of religion often, if not invariably, requires the performance of (or abstention from) certain acts. *Ante*, at 877; cf. 3 A New English Dictionary on Historical Principles 401–402 (J. Murray ed. 1897) (defining "exercise" to include "[t]he practice and performance of rites and ceremonies, worship, etc.; the right or permission to celebrate the observances (of a religion)" and religious observances such as acts of public and private worship, preaching, and prophesying). "[B]elief and action cannot be neatly confined in logic-tight compartments." *Wisconsin* v. *Yoder*, 406 U. S. 205, 220 (1972). Because the First Amendment does not distinguish between religious belief and religious conduct, conduct motivated by sincere religious belief, like the belief itself, must be at least presumptively protected by the Free Exercise Clause.

The Court today, however, interprets the Clause to permit the government to prohibit, without justification, conduct mandated by an individual's religious beliefs, so long as that prohibition is generally applicable. *Ante*, at 878. But a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion. A person who is barred from engaging in religiously motivated conduct is barred from freely exercising his religion. Moreover, that person is barred from freely exercising his religion regardless of whether the law prohibits the conduct only when engaged in for religious reasons, only by members of that religion, or by all persons. It is difficult to deny that a law that prohibits religiously motivated conduct, even if the law is generally applicable, does not at least implicate First Amendment concerns.

The Court responds that generally applicable laws are "one large step" removed from laws aimed at specific religious practices. *Ibid.* The First Amendment, however, does not distinguish between laws that are generally applicable and laws that target particular religious practices. Indeed, few States would be so naive as to enact a law directly prohibiting or burdening a religious practice as such. Our free exercise cases have all concerned generally applicable laws that had the effect of significantly burdening a religious practice. If the First Amendment is to have any vitality, it ought not be construed to cover only the extreme and hypothetical situation in which a State directly targets a religious practice. As we have noted in a slightly different context, "'[s]uch a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimum scrutiny that the Equal Protection Clause already provides.'" *Hobbie* v. *Unemployment Appeals Comm'n of Florida,* 480 U. S. 136, 141–142 (1987) (quoting *Bowen* v. *Roy,* 476 U. S. 693, 727 (1986) (O'CONNOR, J., concurring in part and dissenting in part)).

To say that a person's right to free exercise has been burdened, of course, does not mean that he has an absolute right to engage in the conduct. Under our established First Amendment jurisprudence, we have recognized that the freedom to act, unlike the freedom to believe, cannot be absolute. See, *e. g., Cantwell, supra,* at 304; *Reynolds* v. *United States,* 98 U. S. 145, 161–167 (1879). Instead, we have respected both the First Amendment's express textual mandate and the governmental interest in regulation of conduct by requiring the government to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest. See *Hernandez* v. *Commissioner,* 490 U. S. 680, 699

(1989); *Hobbie, supra,* at 141; *United States* v. *Lee,* 455 U. S. 252, 257–258 (1982); *Thomas* v. *Review Bd. of Indiana Employment Security Div.,* 450 U. S. 707, 718 (1981); *McDaniel* v. *Paty,* 435 U. S. 618, 626–629 (1978) (plurality opinion); *Yoder, supra,* at 215; *Gillette* v. *United States,* 401 U. S. 437, 462 (1971); *Sherbert* v. *Verner,* 374 U. S. 398, 403 (1963); see also *Bowen* v. *Roy, supra,* at 732 (opinion concurring in part and dissenting in part); *West Virginia State Bd. of Ed.* v. *Barnette,* 319 U. S. 624, 639 (1943). The compelling interest test effectuates the First Amendment's command that religious liberty is an independent liberty, that it occupies a preferred position, and that the Court will not permit encroachments upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests "of the highest order," *Yoder, supra,* at 215. "Only an especially important governmental interest pursued by narrowly tailored means can justify exacting a sacrifice of First Amendment freedoms as the price for an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Roy, supra,* at 728 (opinion concurring in part and dissenting in part).

The Court attempts to support its narrow reading of the Clause by claiming that "[w]e have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Ante,* at 878–879. But as the Court later notes, as it must, in cases such as *Cantwell* and *Yoder* we have in fact interpreted the Free Exercise Clause to forbid application of a generally applicable prohibition to religiously motivated conduct. See *Cantwell, supra,* at 304–307; *Yoder,* 406 U. S., at 214–234. Indeed, in *Yoder* we expressely rejected the interpretation the Court now adopts:

> "[O]ur decisions have rejected the idea that religiously grounded conduct is always outside the protection of the Free Exercise Clause. It is true that activities of individuals, even when religiously based, are often subject

> to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers. But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability*. . . .
>
> ". . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion." *Id.*, at 219–220 (emphasis added; citations omitted).

The Court endeavors to escape from our decisions in *Cantwell* and *Yoder* by labeling them "hybrid" decisions, *ante*, at 892, but there is no denying that both cases expressly relied on the Free Exercise Clause, see *Cantwell*, 310 U. S., at 303–307; *Yoder, supra*, at 219–229, and that we have consistently regarded those cases as part of the mainstream of our free exercise jurisprudence. Moreover, in each of the other cases cited by the Court to support its categorical rule, *ante*, at 879–880, we rejected the particular constitutional claims before us only after carefully weighing the competing interests. See *Prince* v. *Massachusetts*, 321 U. S. 158, 168–170 (1944) (state interest in regulating children's activities justifies denial of religious exemption from child labor laws); *Braunfeld* v. *Brown*, 366 U. S. 599, 608–609 (1961) (plurality opinion) (state interest in uniform day of rest justifies denial of religious exemption from Sunday closing law); *Gillette, supra*, at 462 (state interest in military affairs justifies denial of religious exemption from conscription laws); *Lee, supra*, at 258–259 (state interest in comprehensive Social Security system justifies denial of religious exemption from mandatory participation requirement). That we rejected the free exercise claims in those cases hardly calls into question the applicability of First Amendment doctrine in the first place. Indeed, it is surely unusual to judge the vitality of a constitutional doctrine by looking to the win-loss record of the plaintiffs who happen to come before us.

B

Respondents, of course, do not contend that their conduct is automatically immune from all governmental regulation simply because it is motivated by their sincere religious beliefs. The Court's rejection of that argument, *ante*, at 882, might therefore be regarded as merely harmless dictum. Rather, respondents invoke our traditional compelling interest test to argue that the Free Exercise Clause requires the State to grant them a limited exemption from its general criminal prohibition against the possession of peyote. The Court today, however, denies them even the opportunity to make that argument, concluding that "the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling interest] test inapplicable to" challenges to general criminal prohibitions. *Ante*, at 885.

In my view, however, the essence of a free exercise claim is relief from a burden imposed by government on religious practices or beliefs, whether the burden is imposed directly through laws that prohibit or compel specific religious practices, or indirectly through laws that, in effect, make abandonment of one's own religion or conformity to the religious beliefs of others the price of an equal place in the civil community. As we explained in *Thomas:*

> "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." 450 U. S., at 717–718.

See also *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 832 (1989); *Hobbie*, 480 U. S., at 141. A State that makes criminal an individual's religiously motivated conduct burdens that individual's free exercise of religion in the severest manner possible, for it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution." *Braunfeld*, *supra*, at 605. I would have thought it beyond argument that such laws implicate free exercise concerns.

Indeed, we have never distinguished between cases in which a State conditions receipt of a benefit on conduct prohibited by religious beliefs and cases in which a State affirmatively prohibits such conduct. The *Sherbert* compelling interest test applies in both kinds of cases. See, *e. g.*, *Lee*, 455 U. S., at 257–260 (applying *Sherbert* to uphold Social Security tax liability); *Gillette*, 401 U. S., at 462 (applying *Sherbert* to uphold military conscription requirement); *Yoder*, 406 U. S., at 215–234 (applying *Sherbert* to strike down criminal convictions for violation of compulsory school attendance law). As I noted in *Bowen* v. *Roy:*

> "The fact that the underlying dispute involves an award of benefits rather than an exaction of penalties does not grant the Government license to apply a different version of the Constitution. . . .
>
> ". . . The fact that appellees seek exemption from a precondition that the Government attaches to an award of benefits does not, therefore, generate a meaningful distinction between this case and one where appellees seek an exemption from the Government's imposition of penalties upon them." 476 U. S., at 731–732 (opinion concurring in part and dissenting in part).

See also *Hobbie*, *supra*, at 141–142; *Sherbert*, 374 U. S., at 404. I would reaffirm that principle today: A neutral criminal law prohibiting conduct that a State may legitimately regulate is, if anything, *more* burdensome than a neutral civil statute placing legitimate conditions on the award of a state benefit.

Legislatures, of course, have always been "left free to reach actions which were in violation of social duties or subversive of good order." *Reynolds*, 98 U. S., at 164; see also *Yoder*, *supra*, at 219–220; *Braunfeld*, 366 U. S., at 603–604. Yet because of the close relationship between conduct and religious belief, "[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." *Cantwell*, 310 U. S., at 304. Once it has been shown that a government regulation or criminal prohibition burdens the free exercise of religion, we have consistently asked the government to demonstrate that unbending application of its regulation to the religious objector "is essential to accomplish an overriding governmental interest," *Lee*, *supra*, at 257–258, or represents "the least restrictive means of achieving some compelling state interest," *Thomas*, *supra*, at 718. See, *e. g.*, *Braunfeld*, *supra*, at 607; *Sherbert*, *supra*, at 406; *Yoder*, *supra*, at 214–215; *Roy*, 476 U. S., at 728–732 (opinion concurring in part and dissenting in part). To me, the sounder approach—the approach more consistent with our role as judges to decide each case on its individual merits—is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant and whether the particular criminal interest asserted by the State before us is compelling. Even if, as an empirical matter, a government's criminal laws might usually serve a compelling interest in health, safety, or public order, the First Amendment at least requires a case-by-case determination of the question, sensitive to the facts of each particular claim. Cf. *McDaniel*, 435 U. S., at 628, n. 8 (plurality opinion) (noting application of *Sherbert* to general criminal prohibitions and the "delicate balancing required by our decisions in" *Sherbert* and *Yoder*). Given the range of conduct that a State might legitimately make criminal, we cannot assume, merely because a law carries criminal sanctions and is generally applicable, that the First Amendment *never* requires the State to grant a limited exemption for religiously motivated conduct.

Moreover, we have not "rejected" or "declined to apply" the compelling interest test in our recent cases. *Ante*, at 883–884. Recent cases have instead affirmed that test as a fundamental part of our First Amendment doctrine. See, *e. g.*, *Hernandez*, 490 U. S., at 699; *Hobbie*, *supra*, at 141–142 (rejecting Chief Justice Burger's suggestion in *Roy*, *supra*, at 707–708, that free exercise claims be assessed under a less rigorous "reasonable means" standard). The cases cited by the Court signal no retreat from our consistent adherence to the compelling interest test. In both *Bowen* v. *Roy*, *supra*, and *Lyng* v. *Northwest Indian Cemetery Protective Assn.*, 485 U. S. 439 (1988), for example, we expressly distinguished *Sherbert* on the ground that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development . . . . The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Roy*, *supra*, at 699; see *Lyng*, *supra*, at 449. This distinction makes sense because "the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Sherbert*, *supra*, at 412 (Douglas, J., concurring). Because the case *sub judice*, like the other cases in which we have applied *Sherbert*, plainly falls into the former category, I would apply those established precedents to the facts of this case.

Similarly, the other cases cited by the Court for the proposition that we have rejected application of the *Sherbert* test outside the unemployment compensation field, *ante*, at 884, are distinguishable because they arose in the narrow, specialized contexts in which we have not traditionally required the government to justify a burden on religious conduct by articulating a compelling interest. See *Goldman* v. *Weinberger*, 475 U. S. 503, 507 (1986) ("Our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society"); *O'Lone* v. *Estate of Shabazz*, 482 U. S. 342, 349 (1987) ("[P]rison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights") (citation omitted). That we did not apply the compelling interest test in these cases says nothing about whether the test should continue to apply in paradigm free exercise cases such as the one presented here.

The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion. Although the Court suggests that the compelling interest test, as applied to generally applicable laws, would result in a "constitutional anomaly," *ante*, at 886, the First Amendment unequivocally makes freedom of religion, like freedom from race discrimination and freedom of speech, a "constitutional nor[m]," not an "anomaly." *Ibid.* Nor would application of our established free exercise doctrine to this case necessarily be incompatible with our equal protection cases. Cf. *Rogers* v. *Lodge*, 458 U. S. 613, 618 (1982) (race-neutral law that "'bears more heavily on one race than another'" may violate equal protection) (citation omitted); *Castaneda* v. *Partida*, 430 U. S. 482, 492–495 (1977) (grand jury selection). We have in any event recognized that the Free Exercise Clause protects values distinct from those protected by the Equal Protection Clause. See *Hobbie*, 480 U. S., at 141–142. As the language of the

Clause itself makes clear, an individual's free exercise of religion is a preferred constitutional activity. See, *e. g.*, McConnell, Accommodation of Religion, 1985 S. Ct. Rev. 1, 9 ("[T]he text of the First Amendment itself 'singles out' religion for special protections"); P. Kauper, Religion and the Constitution 17 (1964). A law that makes criminal such an activity therefore triggers constitutional concern—and heightened judicial scrutiny—even if it does not target the particular religious conduct at issue. Our free speech cases similarly recognize that neutral regulations that affect free speech values are subject to a balancing, rather than categorical, approach. See, *e. g.*, *United States* v. *O'Brien*, 391 U. S. 367, 377 (1968); *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. 41, 46–47 (1986); cf. *Anderson* v. *Celebrezze*, 460 U. S. 780, 792–794 (1983) (generally applicable laws may impinge on free association concerns). The Court's parade of horribles, *ante*, at 888–889, not only fails as a reason for discarding the compelling interest test, it instead demonstrates just the opposite: that courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests.

Finally, the Court today suggests that the disfavoring of minority religions is an "unavoidable consequence" under our system of government and that accommodation of such religions must be left to the political process. *Ante*, at 890. In my view, however, the First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility. The history of our free exercise doctrine amply demonstrates the harsh impact majoritarian rule has had on unpopular or emerging religious groups such as the Jehovah's Witnesses and the Amish. Indeed, the words of Justice Jackson in *West Virginia State Bd. of Ed.* v. *Barnette* (overruling *Minersville School Dist.* v. *Gobitis*, 310 U. S. 586 (1940)) are apt:

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." 319 U. S., at 638.

See also *United States* v. *Ballard*, 322 U. S. 78, 87 (1944) ("The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views"). The compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a "luxury," *ante*, at 888, is to denigrate "[t]he very purpose of a Bill of Rights."

III

The Court's holding today not only misreads settled First Amendment precedent; it appears to be unnecessary to this case. I would reach the same result applying our established free exercise jurisprudence.

A

There is no dispute that Oregon's criminal prohibition of peyote places a severe burden on the ability of respondents to freely exercise their religion. Peyote is a sacrament of the Native American Church and is regarded as vital to respondents' ability to practice their religion. See O. Stewart, Peyote Religion: A History 327–336 (1987) (describing modern status of peyotism); E. Anderson, Peyote: The Divine Cactus 41–65 (1980) (describing peyote ceremonies); Teachings from the American Earth: Indian Religion and Philosophy 96–104 (D. Tedlock & B. Tedlock eds. 1975) (same); see also *People* v. *Woody*, 61 Cal. 2d 716, 721–722, 394 P. 2d 813, 817–818 (1964). As we noted in *Smith I*, the Oregon Supreme Court concluded that "the Native American Church is a recognized religion, that peyote is a sacrament of that church, and that respondent's beliefs were sincerely held." 485 U. S., at 667. Under Oregon law, as construed by that State's highest court, members of the Native American Church must choose between carrying out the ritual embodying their religious beliefs and avoidance of criminal prosecution. That choice is, in my view, more than sufficient to trigger First Amendment scrutiny.

There is also no dispute that Oregon has a significant interest in enforcing laws that control the possession and use of controlled substances by its citizens. See, *e. g.*, *Sherbert*, 374 U. S., at 403 (religiously motivated conduct may be regulated where such conduct "pose[s] some substantial threat to public safety, peace or order"); *Yoder*, 406 U. S., at 220 ("[A]ctivities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare"). As we recently noted, drug abuse is "one of the greatest problems affecting the health and welfare of our population" and thus "one of the most serious problems confronting our society today." *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 668, 674 (1989). Indeed, under federal law (incorporated by Oregon law in relevant part, see Ore. Rev. Stat. § 475.005(6) (1987)), peyote is specifically regulated as a Schedule I controlled substance, which means that Congress has found that it has a high potential for abuse, that there is no currently accepted medical use, and that there is a lack of accepted safety for use of the drug under medical supervision. See 21 U. S. C. § 812(b)(1). See generally R. Julien, A Primer of Drug Action 149 (3d ed. 1981). In light of our recent decisions holding that the governmental interests in the collection of income tax, *Hernandez*, 490 U. S., at 699–700, a comprehensive Social Security system, see *Lee*, 455 U. S., at 258–259, and military conscription, see *Gillette*, 401 U. S., at 460, are compelling, respondents do not seriously dispute that Oregon has a compelling interest in prohibiting the possession of peyote by its citizens.

B

Thus, the critical question in this case is whether exempting respondents from the State's general criminal prohibition "will unduly interfere with fulfillment of the governmental interest." *Lee, supra*, at 259; see also *Roy*, 476 U. S., at 727 ("[T]he Government must accommodate a legitimate free exercise claim unless pursuing an especially important interest by narrowly tailored means"); *Yoder, supra*, at 221; *Braunfeld*, 366 U. S., at 605–607. Although the question is close, I would conclude that uniform application of Oregon's criminal prohibition is "essential to accomplish," *Lee, supra*, at 257, its overriding interest in preventing the physical harm caused by the use of a Schedule I controlled substance. Oregon's criminal prohibition represents that State's judgment that the possession and use of controlled substances, even by only one person, is inherently harmful and dangerous. Because the health effects caused by the use of controlled substances exist regardless of the motivation of the user, the use of such substances, even for religious purposes, violates the very purpose of the laws that prohibit them. Cf. *State* v. *Massey*, 229 N. C. 734, 51 S. E. 2d 179 (denying religious exemption to municipal ordinance prohibiting handling of poisonous reptiles), appeal dism'd *sub nom. Bunn* v. *North Carolina*, 336 U. S. 942 (1949). Moreover, in view of the societal interest in preventing trafficking in controlled substances, uniform application of the criminal prohibition at issue is essential to the effectiveness of Oregon's stated interest in preventing any possession of peyote. Cf. *Jacobson* v.

Massachusetts, 197 U. S. 11 (1905) (denying exemption from small pox vaccination requirement).

For these reasons, I believe that granting a selective exemption in this case would seriously impair Oregon's compelling interest in prohibiting possession of peyote by its citizens. Under such circumstances, the Free Exercise Clause does not require the State to accommodate respondents' religiously motivated conduct. See, *e. g.*, *Thomas*, 450 U. S., at 719. Unlike in *Yoder*, where we noted that "[t]he record strongly indicates that accommodating the religious objections of the Amish by forgoing one, or at most two, additional years of compulsory education will not impair the physical or mental health of the child, or result in an inability to be self-supporting or to discharge the duties and responsibilities of citizenship, or in any other way materially detract from the welfare of society," 406 U. S., at 234; see also *id.*, at 238–240 (WHITE, J., concurring), a religious exemption in this case would be incompatible with the State's interest in controlling use and possession of illegal drugs.

Respondents contend that any incompatibility is belied by the fact that the Federal Government and several States provide exemptions for the religious use of peyote, see 21 CFR §1307.31 (1989); 307 Ore., at 73, n. 2, 763 P. 2d, at 148, n. 2 (citing 11 state statutes that expressly exempt sacramental peyote use from criminal proscription). But other governments may surely choose to grant an exemption without Oregon, with its specific asserted interest in uniform application of its drug laws, being *required* to do so by the First Amendment. Respondents also note that the sacramental use of peyote is central to the tenets of the Native American Church, but I agree with the Court, *ante*, at 886–887, that because "'[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith,'" quoting *Hernandez*, *supra*, at 699, our determination of the constitutionality of Oregon's general criminal prohibition cannot, and should not, turn on the centrality of the particular religious practice at issue. This does not mean, of course, that courts may not make factual findings as to whether a claimant holds a sincerely held religious belief that conflicts with, and thus is burdened by, the challenged law. The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine, see *Ballard*, 322 U. S., at 85–88, and one that courts are capable of making. See *Tony and Susan Alamo Foundation* v. *Secretary of Labor*, 471 U. S. 290, 303–305 (1985).

I would therefore adhere to our established free exercise jurisprudence and hold that the State in this case has a compelling interest in regulating peyote use by its citizens and that accommodating respondents' religiously motivated conduct "will unduly interfere with fulfillment of the governmental interest." *Lee*, *supra*, at 259. Accordingly, I concur in the judgment of the Court.

JUSTICE BLACKMUN, with whom JUSTICE BRENNAN and JUSTICE MARSHALL join, dissenting.

This Court over the years painstakingly has developed a consistent and exacting standard to test the constitutionality of a state statute that burdens the free exercise of religion. Such a statute may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means.[1]

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[1] See *Hernandez* v. *Commissioner*, 490 U. S. 680, 699 (1989) ("The free exercise inquiry asks whether government has placed a substantial burden on the observation of a central religious belief or practice and, if so, whether a compelling governmental interest justifies the burden"); *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 141 (1987) (state laws burdening religions "must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest"); *Bowen* v. *Roy*, 476 U. S. 693, 732 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("Our precedents have long required the Government to show that a compelling state interest is served by its refusal to grant a religious exemption"); *United States* v. *Lee*, 455 U. S. 252, 257–258

Until today, I thought this was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a "constitutional anomaly." *Ante*, at 886. As carefully detailed in JUSTICE O'CONNOR's concurring opinion, *ante*, p. 891, the majority is able to arrive at this view only by mischaracterizing this Court's precedents. The Court discards leading free exercise cases such as *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), and *Wisconsin* v. *Yoder*, 406 U. S. 205 (1972), as "hybrid." *Ante*, at 882. The Court views traditional free exercise analysis as somehow inapplicable to criminal prohibitions (as opposed to conditions on the receipt of benefits), and to state laws of general applicability (as opposed, presumably, to laws that expressly single out religious practices). *Ante*, at 884–885. The Court cites cases in which, due to various exceptional circumstances, we found strict scrutiny inapposite, to hint that the Court has repudiated that standard altogether. *Ante*, at 882–884. In short, it effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution. One hopes that the Court is aware of the consequences, and that its result is not a product of overreaction to the serious problems the country's drug crisis has generated.

This distorted view of our precedents leads the majority to conclude that strict scrutiny of a state law burdening the free exercise of religion is a "luxury" that a well-ordered society

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(1982) ("The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest"); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 718 (1981) ("The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest"); *Wisconsin* v. *Yoder*, 406 U. S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *Sherbert* v. *Verner*, 374 U. S. 398, 406 (1963) (question is "whether some compelling state interest . . . justifies the substantial infringement of appellant's First Amendment right").

cannot afford, *ante*, at 888, and that the repression of minority religions is an "unavoidable consequence of democratic government." *Ante*, at 890. I do not believe the Founders thought their dearly bought freedom from religious persecution a "luxury," but an essential element of liberty—and they could not have thought religious intolerance "unavoidable," for they drafted the Religion Clauses precisely in order to avoid that intolerance.

For these reasons, I agree with JUSTICE O'CONNOR's analysis of the applicable free exercise doctrine, and I join parts I and II of her opinion.[2] As she points out, "the critical question in this case is whether exempting respondents from the State's general criminal prohibition 'will unduly interfere with fulfillment of the governmental interest.'" *Ante*, at 905, quoting *United States* v. *Lee*, 455 U. S. 252, 259 (1982). I do disagree, however, with her specific answer to that question.

I

In weighing the clear interest of respondents Smith and Black (hereinafter respondents) in the free exercise of their religion against Oregon's asserted interest in enforcing its drug laws, it is important to articulate in precise terms the state interest involved. It is not the State's broad interest in fighting the critical "war on drugs" that must be weighed against respondents' claim, but the State's narrow interest in refusing to make an exception for the religious, ceremonial use of peyote. See *Bowen* v. *Roy*, 476 U. S. 693, 728 (1986) (O'CONNOR, J., concurring in part and dissenting in part) ("This Court has consistently asked the Government to demonstrate that unbending application of its regulation to the religious objector 'is essential to accomplish an overriding governmental interest,'" quoting *Lee*, 455 U. S., at 257–258); *Thomas* v. *Review Bd. of Indiana Employment Security Div.*, 450 U. S. 707, 719 (1981) ("focus of the inquiry" concerning State's asserted interest must be "properly narrowed"); *Yoder*, 406 U. S., at 221 ("Where fundamental claims of religious freedom are at stake," the Court will not accept a State's "sweeping claim" that its interest in compulsory education is compelling; despite the validity of this interest "in the generality of cases, we must searchingly examine the interests that the State seeks to promote . . . and the impediment to those objectives that would flow from recognizing the claimed Amish exemption"). Failure to reduce the competing interests to the same plane of generality tends to distort the weighing process in the State's favor. See Clark, Guidelines for the Free Exercise Clause, 83 Harv. L. Rev. 327, 330–331 (1969) ("The purpose of almost any law can be traced back to one or another of the fundamental concerns of government: public health and safety, public peace and order, defense, revenue. To measure an individual interest directly against one of these rarified values inevitably makes the individual interest appear the less significant"); Pound, A Survey of Social Interests, 57 Harv. L. Rev. 1, 2 (1943) ("When it comes to weighing or valuing claims or demands with respect to other claims or demands, we must be careful to compare them on the same plane . . . [or else] we may decide the question in advance in our very way of putting it").

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[2] I reluctantly agree that, in light of this Court's decision in *Employment Division, Dept. of Human Resources of Ore.* v. *Smith*, 485 U. S. 660 (1988), the question on which certiorari was granted is properly presented in this case. I have grave doubts, however, as to the wisdom or propriety of deciding the constitutionality of a criminal prohibition which the State has not sought to enforce, which the State did not rely on in defending its denial of unemployment benefits before the state courts, and which the Oregon courts could, on remand, either invalidate on state constitutional grounds, or conclude that it remains irrelevant to Oregon's interest in administering its unemployment benefits program.

It is surprising, to say the least, that this Court which so often prides itself about principles of judicial restraint and reduction of federal control over matters of state law would stretch its jurisdiction to the limit in order to reach, in this abstract setting, the constitutionality of Oregon's criminal prohibition of peyote use.

The State's interest in enforcing its prohibition, in order to be sufficiently compelling to outweigh a free exercise claim, cannot be merely abstract or symbolic. The State cannot plausibly assert that unbending application of a criminal prohibition is essential to fulfill any compelling interest, if it does not, in fact, attempt to enforce that prohibition. In this case, the State actually has not evinced any concrete interest in enforcing its drug laws against religious users of peyote. Oregon has never sought to prosecute respondents, and does not claim that it has made significant enforcement efforts against other religious users of peyote.[3] The State's asserted interest thus amounts only to the symbolic preservation of an unenforced prohibition. But a government interest in "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs," *Treasury Employees* v. *Von Raab*, 489 U. S. 656, 687 (1989) (SCALIA, J., dissenting), cannot suffice to abrogate the constitutional rights of individuals.

Similarly, this Court's prior decisions have not allowed a government to rely on mere speculation about potential harms, but have demanded evidentiary support for a refusal to allow a religious exception. See *Thomas*, 450 U. S., at 719 (rejecting State's reasons for refusing religious exemption, for lack of "evidence in the record"); *Yoder*, 406 U. S., at 224–229 (rejecting State's argument concerning the dangers of a religious exemption as speculative, and unsupported by the record); *Sherbert* v. *Verner*, 374 U. S. 398, 407 (1963) ("[T]here is no proof whatever to warrant such fears . . . as those which the [State] now advance[s]"). In this case, the State's justification for refusing to recognize an exception to its criminal laws for religious peyote use is entirely speculative.

The State proclaims an interest in protecting the health and safety of its citizens from the dangers of unlawful drugs. It offers, however, no evidence that the religious use of peyote has ever harmed anyone.[4] The factual findings of other courts cast doubt on the State's assumption that religious use of peyote is harmful. See *State* v. *Whittingham*, 19 Ariz. App. 27, 30, 504 P. 2d 950, 953 (1973) ("[T]he State failed to prove that the quantities of peyote used in the sacraments of the Native American Church are sufficiently harmful to the health and welfare of the participants so as to permit a legitimate intrusion under the State's police power"); *People* v. *Woody*, 61 Cal. 2d 716, 722–723, 394 P. 2d 813, 818 (1964) ("[A]s the Attorney General . . . admits, . . . the opinion of scientists and other experts is 'that peyote . . . works no permanent deleterious injury to the Indian'").

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[3] The only reported case in which the State of Oregon has sought to prosecute a person for religious peyote use is *State* v. *Soto*, 21 Ore. App. 794, 537 P. 2d 142 (1975), cert. denied, 424 U. S. 955 (1976).

The fact that peyote is classified as a Schedule I controlled substance does not, by itself, show that any and all uses of peyote, in any circumstance, are inherently harmful and dangerous. The Federal Government, which created the classifications of unlawful drugs from which Oregon's drug laws are derived, apparently does not find peyote so dangerous as to preclude an exemption for religious use.[5] Moreover,

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[4] This dearth of evidence is not surprising, since the State never asserted this health and safety interest before the Oregon courts; thus, there was no opportunity for factfinding concerning the alleged dangers of peyote use. What has now become the State's principal argument for its view that the criminal prohibition is enforceable against religious use of peyote rests on no evidentiary foundation at all.

[5] See 21 CFR § 1307.31 (1989) ("The listing of peyote as a controlled substance in Schedule I does not apply to the nondrug use of peyote in bona fide religious ceremonies of the Native American Church, and members of the Native American Church so using peyote are exempt from registration. Any person who manufactures peyote for or distributes peyote to the Native American Church, however, is required to obtain registration annually and to comply with all other requirements of law"); see *Olsen* v. *Drug Enforcement Admin.*, 279 U. S. App. D. C. 1, 6–7, 878 F. 2d 1458, 1463–1464 (1989) (explaining DEA's rationale for the exception).

Moreover, 23 States, including many that have significant Native American populations, have statutory or judicially crafted exemptions in their drug laws for religious use of peyote. See 307 Ore. 68, 73, n. 2, 763 P. 2d 146, 148, n. 2 (1988) (case below). Although this does not prove that Ore-other Schedule I drugs have lawful uses. See *Olsen* v. *Drug Enforcement Admin.*, 279 U. S. App. D. C. 1, 6, n. 4, 878 F. 2d 1458, 1463, n. 4 (medical and research uses of marijuana).

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs.[6] The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns. See *id.*, at 10, 878 F. 2d, at 1467 ("'The Administrator [of the Drug Enforcement Administration (DEA)] finds that . . . the Native American Church's use of peyote is isolated to specific ceremonial occasions,'" and so "'an accommodation can be made for a religious organization which uses peyote in circumscribed ceremonies'" (quoting DEA Final Order)); *id.*, at 7, 878 F. 2d, at 1464 ("[F]or members of the Native American Church, use of peyote outside the ritual is sacrilegious"); *Woody*, 61 Cal. 2d, at 721, 394 P. 2d, at 817 ("[T]o use peyote for nonreligious purposes is sacrilegious"); R. Julien, A Primer of Drug Action 148 (3d ed. 1981) ("[P]eyote is seldom abused by members of the Native American

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gon must have such an exception too, it is significant that these States, and the Federal Government, all find their (presumably compelling) interests in controlling the use of dangerous drugs compatible with an exemption for religious use of peyote. Cf. *Boos* v. *Barry*, 485 U. S. 312, 329 (1988) (finding that an ordinance restricting picketing near a foreign embassy was not the least restrictive means of serving the asserted government interest; existence of an analogous, but more narrowly drawn, federal statute showed that "a less restrictive alternative is readily available").

[6] In this respect, respondents' use of peyote seems closely analogous to the sacramental use of wine by the Roman Catholic Church. During Prohibition, the Federal Government exempted such use of wine from its general ban on possession and use of alcohol. See National Prohibition Act, Title II, § 3, 41 Stat. 308. However compelling the Government's then general interest in prohibiting the use of alcohol may have been, it could not plausibly have asserted an interest sufficiently compelling to outweigh Catholics' right to take communion.

Church"); Slotkin, The Peyote Way, in Teachings from the American Earth 96, 104 (D. Tedlock & B. Tedlock eds. 1975) ("[T]he Native American Church . . . refuses to permit the presence of curiosity seekers at its rites, and vigorously opposes the sale or use of Peyote for non-sacramental purposes"); Bergman, Navajo Peyote Use: Its Apparent Safety, 128 Am. J. Psychiatry 695 (1971) (Bergman).[7]

Moreover, just as in *Yoder*, the values and interests of those seeking a religious exemption in this case are congruent, to a great degree, with those the State seeks to promote through its drug laws. See *Yoder*, 406 U. S., at 224, 228–229 (since the Amish accept formal schooling up to 8th grade, and then provide "ideal" vocational education, State's interest in enforcing its law against the Amish is "less substantial than . . . for children generally"); *id.*, at 238 (WHITE, J., concurring). Not only does the church's doctrine forbid nonreligious use of peyote; it also generally advocates self-reliance, familial responsibility, and abstinence from alcohol. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 33–34 (the church's "ethical code" has four parts: brotherly love, care of family, self-reliance, and avoidance of alcohol (quoting from the church membership card)); *Olsen*, 279 U. S. App. D. C., at 7, 878 F. 2d, at 1464 (the Native American Church, "for all purposes other than the special, stylized ceremony, reinforced the state's prohibition");

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[7] The use of peyote is, to some degree, self-limiting. The peyote plant is extremely bitter, and eating it is an unpleasant experience, which would tend to discourage casual or recreational use. See *State* v. *Whittingham*, 19 Ariz. App. 27, 30, 504 P. 2d 950, 953 (1973) ("'[P]eyote can cause vomiting by reason of its bitter taste'"); E. Anderson, Peyote: The Divine Cactus 161 (1980) ("[T]he eating of peyote usually is a difficult ordeal in that nausea and other unpleasant physical manifestations occur regularly. Repeated use is likely, therefore, only if one is a serious researcher or is devoutly involved in taking peyote as part of a religious ceremony"); Slotkin, The Peyote Way, in Teachings from the American Earth 96, 98 (D. Tedlock & B. Tedlock eds. 1975) ("[M]any find it bitter, inducing indigestion or nausea").

Woody, 61 Cal. 2d, at 721–722, n. 3, 394 P. 2d, at 818, n. 3 ("[M]ost anthropological authorities hold Peyotism to be a positive, rather than negative, force in the lives of its adherents . . . the church forbids the use of alcohol . . ."). There is considerable evidence that the spiritual and social support provided by the church has been effective in combating the tragic effects of alcoholism on the Native American population. Two noted experts on peyotism, Dr. Omer C. Stewart and Dr. Robert Bergman, testified by affidavit to this effect on behalf of respondent Smith before the Employment Appeal Board. Smith Tr., Exh. 7; see also E. Anderson, Peyote: The Divine Cactus 165–166 (1980) (research by Dr. Bergman suggests "that the religious use of peyote seemed to be directed in an ego-strengthening direction with an emphasis on interpersonal relationships where each individual is assured of his own significance as well as the support of the group"; many people have "'come through difficult crises with the help of this religion . . . . It provides real help in seeing themselves not as people whose place and way in the world is gone, but as people whose way can be strong enough to change and meet new challenges'" (quoting Bergman 698)); Pascarosa & Futterman, Ethnopsychedelic Therapy for Alcoholics: Observations in the Peyote Ritual of the Native American Church, 8 J. of Psychedelic Drugs, No. 3, p. 215 (1976) (religious peyote use has been helpful in overcoming alcoholism); Albaugh & Anderson, Peyote in the Treatment of Alcoholism among American Indians, 131 Am. J. Psychiatry 1247, 1249 (1974) ("[T]he philosophy, teachings, and format of the [Native American Church] can be of great benefit to the Indian alcoholic"); see generally O. Stewart, Peyote Religion 75 *et seq.* (1987) (noting frequent observations, across many tribes and periods in history, of correlation between peyotist religion and abstinence from alcohol). Far from promoting the lawless and irresponsible use of drugs, Native American Church members' spiritual code exemplifies values that Oregon's drug laws are presumably intended to foster.

The State also seeks to support its refusal to make an exception for religious use of peyote by invoking its interest in abolishing drug trafficking. There is, however, practically no illegal traffic in peyote. See *Olsen*, 279 U. S. App. D. C., at 6, 7, 878 F. 2d, at 1463, 1467 (quoting DEA Final Order to the effect that total amount of peyote seized and analyzed by federal authorities between 1980 and 1987 was 19.4 pounds; in contrast, total amount of marijuana seized during that period was over 15 million pounds). Also, the availability of peyote for religious use, even if Oregon were to allow an exemption from its criminal laws, would still be strictly controlled by federal regulations, see 21 U. S. C. §§821–823 (registration requirements for distribution of controlled substances); 21 CFR §1307.31 (1989) (distribution of peyote to Native American Church subject to registration requirements), and by the State of Texas, the only State in which peyote grows in significant quantities. See Texas Health & Safety Code Ann. §481.111 (1990 pamphlet); Texas Admin. Code, Tit. 37, pt. 1, ch. 13, Controlled Substances Regulations, §§13.35–13.41 (1989); *Woody*, 61 Cal. 2d, at 720, 394 P. 2d, at 816 (peyote is "found in the Rio Grande Valley of Texas and northern Mexico"). Peyote simply is not a popular drug; its distribution for use in religious rituals has nothing to do with the vast and violent traffic in illegal narcotics that plagues this country.

Finally, the State argues that granting an exception for religious peyote use would erode its interest in the uniform, fair, and certain enforcement of its drug laws. The State fears that, if it grants an exemption for religious peyote use, a flood of other claims to religious exemptions will follow. It would then be placed in a dilemma, it says, between allowing a patchwork of exemptions that would hinder its law enforcement efforts, and risking a violation of the Establishment Clause by arbitrarily limiting its religious exemptions. This argument, however, could be made in almost any free exercise case. See Lupu, Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion, 102 Harv. L. Rev. 933, 947 (1989) ("Behind every free exercise claim is a spectral march; grant this one, a voice whispers to each judge, and you will be confronted with an endless chain of exemption demands from religious deviants of every stripe"). This Court, however, consistently has rejected similar arguments in past free exercise cases, and it should do so here as well. See *Frazee* v. *Illinois Dept. of Employment Security*, 489 U. S. 829, 835 (1989) (rejecting State's speculation concerning cumulative effect of many similar claims); *Thomas*, 450 U. S., at 719 (same); *Sherbert*, 374 U. S., at 407.

The State's apprehension of a flood of other religious claims is purely speculative. Almost half the States, and the Federal Government, have maintained an exemption for religious peyote use for many years, and apparently have not found themselves overwhelmed by claims to other religious exemptions.[8] Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church. See, *e. g.*, *Olsen*, 279 U. S. App. D. C., at 7, 878 F. 2d, at 1464 ("[T]he Ethiopian Zion Coptic Church . . . teaches that marijuana is properly smoked 'continually all day'"). Some religious claims, see n. 8, *supra*, involve drugs such as marijuana and heroin, in which there is significant illegal traffic, with its attendant greed and violence, so that it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts.[9] That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the "compelling interest" *test* to all free exercise claims, not by reaching uniform *results* as to all claims. A showing that religious peyote use does not unduly interfere with the State's interests is "one that probably few other religious groups or sects could make," *Yoder*, 406 U. S., at 236; this does not mean that an exemption limited to peyote use is tantamount to an establishment of religion. See *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U. S. 136, 144–145 (1987) ("[T]he government may (and

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[8] Over the years, various sects have raised free exercise claims regarding drug use. In no reported case, except those involving claims of religious peyote use, has the claimant prevailed. See, *e. g.*, *Olsen* v. *Iowa*, 808 F. 2d 652 (CA8 1986) (marijuana use by Ethiopian Zion Coptic Church); *United States* v. *Rush*, 738 F. 2d 497 (CA1 1984) (same), cert. denied, 470 U. S. 1004 (1985); *United States* v. *Middleton*, 690 F. 2d 820 (CA11 1982) (same), cert denied, 460 U. S. 1051 (1983); *United States* v. *Hudson*, 431 F. 2d 468 (CA5 1970) (marijuana and heroin use by Moslems), cert denied, 400 U. S. 1011 (1971); *Leary* v. *United States*, 383 F. 2d 851 (CA5 1967) (marijuana use by Hindu), rev'd on other grounds, 395 U. S. 6 (1969); *Commonwealth* v. *Nissenbaum*, 404 Mass. 575, 536 N. E. 2d 592 (1989) (marijuana use by Ethiopian Zion Coptic Church); *State* v. *Blake*, 5 Haw. App. 411, 695 P. 2d 336 (1985) (marijuana use in practice of Hindu Tantrism); *Whyte* v. *United States*, 471 A. 2d 1018 (D. C. App. 1984) (marijuana use by Rastafarian); *State* v. *Rocheleau*, 142 Vt. 61, 451 A. 2d 1144 (1982) (marijuana use by Tantric Buddhist); *State* v. *Brashear*, 92 N. M. 622, 593 P. 2d 63 (1979) (marijuana use by nondenominational Christian); *State* v. *Randall*, 540 S. W. 2d 156 (Mo. App. 1976) (marijuana, LSD, and hashish use by Aquarian Brotherhood Church). See generally Annotation, Free

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Exercise of Religion as Defense to Prosecution for Narcotic or Psychedelic Drug Offense, 35 A. L. R. 3d 939 (1971 and Supp. 1989).

[9] Thus, this case is distinguishable from *United States* v. *Lee*, 455 U. S. 252 (1982), in which the Court concluded that there was "no principled way" to distinguish other exemption claims, and the "tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief." *Id.*, at 260.

sometimes must) accommodate religious practices and . . . may do so without violating the Establishment Clause"); *Yoder*, 406 U. S., at 220–221 ("Court must not ignore the danger that an exception from a general [law] . . . may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the protection of values promoted by the right of free exercise"); *id.*, at 234, n. 22.

II

Finally, although I agree with JUSTICE O'CONNOR that courts should refrain from delving into questions whether, as a matter of religious doctrine, a particular practice is "central" to the religion, *ante*, at 906–907, I do not think this means that the courts must turn a blind eye to the severe impact of a State's restrictions on the adherents of a minority religion. Cf. *Yoder*, 406 U. S., at 219 (since "education is inseparable from and a part of the basic tenets of their religion . . . [, just as] baptism, the confessional, or a sabbath may be for others," enforcement of State's compulsory education law would "gravely endanger if not destroy the free exercise of respondents' religious beliefs").

Respondents believe, and their sincerity has *never* been at issue, that the peyote plant embodies their deity, and eating it is an act of worship and communion. Without peyote, they could not enact the essential ritual of their religion. See Brief for Association on American Indian Affairs et al. as *Amici Curiae* 5–6 ("To the members, peyote is consecrated with powers to heal body, mind and spirit. It is a teacher; it teaches the way to spiritual life through living in harmony and balance with the forces of the Creation. The rituals are an integral part of the life process. They embody a form of worship in which the sacrament Peyote is the means for communicating with the Great Spirit"). See also O. Stewart, Peyote Religion 327–330 (1987) (description of peyote ritual);

T. Hillerman, People of Darkness 153 (1980) (description of Navajo peyote ritual).

If Oregon can constitutionally prosecute them for this act of worship, they, like the Amish, may be "forced to migrate to some other and more tolerant region." *Yoder*, 406 U. S., at 218. This potentially devastating impact must be viewed in light of the federal policy—reached in reaction to many years of religious persecution and intolerance—of protecting the religious freedom of Native Americans. See American Indian Religious Freedom Act, 92 Stat. 469, 42 U. S. C. § 1996 (1982 ed.) ("[I]t shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions . . . , including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites").[10] Congress recognized that certain substances, such as peyote, "have religious significance because they are sacred, they have power, they heal, they are necessary to the exercise of the rites of the religion, they are necessary to the cultural integrity of the tribe, and, therefore, religious survival." H. R. Rep. No. 95–1308, p. 2 (1978).

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[10] See Federal Agencies Task Force, Report to Congress on American Indian Religious Freedom Act of 1978, pp. 1–8 (Aug. 1979) (history of religious persecution); Barsh, The Illusion of Religious Freedom for Indigenous Americans, 65 Ore. L. Rev. 363, 369–374 (1986).

Indeed, Oregon's attitude toward respondents' religious peyote use harkens back to the repressive federal policies pursued a century ago:

"In the government's view, traditional practices were not only morally degrading, but unhealthy. 'Indians are fond of gatherings of every description,' a 1913 public health study complained, advocating the restriction of dances and 'sings' to stem contagious diseases. In 1921, Commissioner of Indian Affairs Charles Burke reminded his staff to punish any Indian engaged in 'any dance which involves . . . the reckless giving away of property . . . frequent or prolonged periods of celebration . . . in fact, any disorderly or plainly excessive performance that promotes superstitious cruelty, licentiousness, idleness, danger to health, and shiftless indifference to family welfare.' Two years later, he forbid Indians under the age of 50 from participating in any dances of any kind, and directed federal employees 'to educate public opinion' against them." *Id.*, at 370–371 (footnotes omitted).

The American Indian Religious Freedom Act, in itself, may not create rights enforceable against government action restricting religious freedom, but this Court must scrupulously apply its free exercise analysis to the religious claims of Native Americans, however unorthodox they may be. Otherwise, both the First Amendment and the stated policy of Congress will offer to Native Americans merely an unfulfilled and hollow promise.

III

For these reasons, I conclude that Oregon's interest in enforcing its drug laws against religious use of peyote is not sufficiently compelling to outweigh respondents' right to the free exercise of their religion. Since the State could not constitutionally enforce its criminal prohibition against respondents, the interests underlying the State's drug laws cannot justify its denial of unemployment benefits. Absent such justification, the State's regulatory interest in denying benefits for religiously motivated "misconduct," see *ante*, at 874, is indistinguishable from the state interests this Court has rejected in *Frazee*, *Hobbie*, *Thomas*, and *Sherbert*. The State of Oregon cannot, consistently with the Free Exercise Clause, deny respondents unemployment benefits.

I dissent.

DEPARTMENT OF THE TREASURY, INTERNAL REVENUE SERVICE *v.* FEDERAL LABOR RELATIONS AUTHORITY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88–2123. Argued January 8, 1990—Decided April 17, 1990

During collective-bargaining negotiations, respondent National Treasury Employees Union (NTEU) proposed that contractual grievance and arbitration provisions be designated as the "internal appeals procedure" required for employee complaints by an Office of Management and Budget (OMB) Circular relating to the "contracting out" of work. Petitioner Internal Revenue Service (IRS) refused to bargain over the proposal, claiming that its subject matter was nonnegotiable under Title VII of the Civil Service Reform Act of 1978 (Act), 5 U. S. C. § 7101 *et seq.* The Federal Labor Relations Authority (FLRA), which is charged with administering the Act, held that the IRS was required to negotiate over the NTEU proposal by § 7114, which requires agency management and employee unions to bargain in good faith to reach an agreement, and by § 7121, which specifies that such agreements must contain grievance-settlement procedures.

Held: The FLRA erred in holding that the Act requires the IRS to bargain over the NTEU proposal. Pp. 926–934.

(a) The plain text of § 7106(a)(2)(B)—which provides that "*nothing in this [Act]* shall affect the authority of [agency management officials] in accordance with applicable laws . . . to make [contracting-out] determinations" (emphasis added)—demonstrates that the section supersedes § 7121. P. 928.

(b) The arguments presented by the FLRA to overcome § 7106(a)(2)(B)'s plain meaning lack merit. First, § 7121(c), which exempts certain appointment, suspension, and removal decisions from the grievance requirements, is not rendered superfluous if such decisions are already insulated from those requirements by § 7106(a), subsection (2)(A) of which refers to those same decisions as protected management rights. Although the two provisions sometimes overlap, each also has a distinct effect on such decisions: § 7121(c) removes them from the coverage of *only* the grievance provisions regardless of whether they are made in accordance with applicable laws, while § 7106 removes them from the coverage of the *entire* Act, but only if they are made in accordance with such laws. Second, agency management cannot be subjected to grievance procedures over the exercise of reserved rights on the theory that § 7121 is among the "applicable laws" referred to in § 7106(a)(2), since that phrase clearly refers to laws *outside the Act.* Third, § 7106(a) is applicable even though the NTEU proposal would not establish any substantive limitation on management's contracting-out decisions, but would only provide for the enforcement of "external limitations" on those decisions contained in the OMB Circular's mandatory and nondiscretionary provisions. Insofar as union rights are concerned, it is entirely up to the IRS whether it will comply *at all* with the Circular's requirements, except to the extent that such compliance is required by an "applicable law." Fourth, it is not reasonable to interpret the latter phrase as being synonymous with the term "any law, rule, or regulation" in § 7103(a)(9)(C)(ii), which defines "grievance" as a claimed "violation, misinterpretation, or misapplication of *any law, rule, or regulation* affecting conditions of employment." (Emphasis added.) Thus, it cannot be said that *all* agency contracting decisions that violate rules or regulations are, by definition, "not in accordance with applicable laws." Pp. 928–932.

(c) This Court will not decide in the first instance whether the OMB Circular is an "applicable law" under § 7106(a)(2). Pp. 932–933.

(d) The question whether § 7117(a)—which provides that the "duty to bargain . . . shall, *to the extent not inconsistent with . . . any Government-wide rule or regulation,* extend to matters which are the subject of any [non-Government-wide] rule or regulation" (emphasis added)—renders the FLRA proposal nonnegotiable as inconsistent with "no arbitration" language in the OMB Circular is not properly presented, since it was not raised or considered by the court below. Nor will this Court consider whether the FLRA properly held the Circular to be a "rule" or "regulation" within § 7103(a)(9)'s meaning, since the IRS did not argue that question here. P. 934.

274 U. S. App. D. C. 135, 862 F. 2d 880, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and WHITE, BLACKMUN, O'CONNOR, and KENNEDY, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, *post,* p. 934. STEVENS, J., filed a dissenting opinion, *post,* p. 937.

Deputy Solicitor General Shapiro argued the cause for petitioner. With him on the briefs were *Acting Solicitor General Bryson, Assistant Attorney General Gerson, Harriet S. Shapiro, William Kanter,* and *Thomas M. Bondy.*

Robert J. Englehart argued the cause for respondent Federal Labor Relations Authority. With him on the brief were *William E. Persina* and *Arthur A. Horowitz. Gregory*

O'Duden argued the cause for respondent National Treasury Employees Union. With him on the brief were *Elaine Kaplan* and *Clinton Wolcott.**

JUSTICE SCALIA delivered the opinion of the Court.

In this case we review the determination of the Federal Labor Relations Authority (FLRA or Authority) that, under Title VII of the Civil Service Reform Act of 1978 (Act), 5 U. S. C. § 7101 *et seq.*, the Internal Revenue Service (IRS) must bargain with the National Treasury Employees Union (NTEU or Union) over a proposed contract provision subjecting to grievance and arbitration procedures claims that the IRS had failed to comply with an Office of Management and Budget (OMB) Circular relating to the "contracting out" of work.

I

Title VII of the Civil Service Reform Act establishes a collective-bargaining system for federal agencies and their employees, under the administration of the FLRA. The Act recognizes the right of federal employees to form and join unions, 5 U. S. C. § 7102, and imposes upon management officials and employee unions the duty to "negotiate in good faith for the purposes of arriving at a collective bargaining agreement." § 7114(a)(4). A collective-bargaining agreement must provide procedures "for the settlement of grievances," § 7121(a)(1), which are defined as "complaint[s] . . . concerning . . . any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment," § 7103(a)(9)(C)(ii); and the agreement must "provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration" which may be invoked by either party.

**Mark D. Roth, Stuart A. Kirsch, Walter Kamiat,* and *Laurence Gold* filed a brief for the American Federation of Labor and Congress of Industrial Organizations et al. as *amici curiae* urging affirmance.

§ 7121(b)(3)(C). The agency's duty to bargain is qualified, however, in one pertinent respect. The Act reserves to management officials the authority "in accordance with applicable laws . . . to make determinations with respect to contracting out." § 7106(a)(2)(B).

Office of Management and Budget Circular A–76 generally directs federal agencies to "contract out" to the private sector their non-"governmental" activities (*e. g.*, data processing) unless certain specified cost comparisons indicate that the activities can be performed more economically "in house." Executive Office of the President, OMB Circular A–76, as revised, 48 Fed. Reg. 37110 (1983). The Circular also requires agencies to establish an administrative appeals procedure to resolve complaints by employees or private bidders relating to "determinations resulting from cost comparisons performed in compliance with [the] Circular," or relating to decisions to contract out where no cost comparison is required. OMB Circular A–76, Supp. I–14, I–15 (1983).

During the course of contract negotiations with the IRS, respondent NTEU put forward a proposal that, with respect to contracting-out decisions employees wished to contest, the "grievance and arbitration" provisions of the collective-bargaining agreement would constitute the "internal appeals procedure" required by the Circular.[1] The IRS refused to bargain over this proposal, taking the position that its subject matter was nonnegotiable under the Act. The Union then petitioned for review by the Authority, which is empowered by the Act to "resolv[e] issues relating to the duty to bargain." § 7105(a)(2)(E); see § 7117(c).

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[1] The proposed contract term read: "The Internal Appeals Procedure shall be the parties' grievance and arbitration provisions of the Master Agreements." 27 F. L. R. A. 976 (1987). The Court of Appeals characterized the proposal as "establish[ing] the 'grievance and arbitration' provisions of the master labor agreement between them as the internal 'administrative appeals procedure' mandated by the Supplement to the Circular for disputed 'contracting-out' cases." 274 U. S. App. D. C. 135, 136, 862 F. 2d 880, 881 (1988). We follow the Court of Appeals' interpretation of the proposed term.

The FLRA held that the IRS was required by §§ 7114 and 7121 to negotiate over the proposal. In its view the IRS' failure to comply with Circular A–76 would be a "violation . . . of [a] law, rule, or regulation" affecting "conditions of employment," so that an employee complaint on the matter would qualify as a "grievance" for which procedures must be specified in the collective-bargaining agreement. 27 F. L. R. A. 976, 978–979 (1987). The FLRA found that the union's proposal was not precluded by § 7106(a)(2)(B)'s reservation of management authority over contracting-out determinations, because it "would only contractually recognize external limitations on management's right." *Id.*, at 978.[2]

The Court of Appeals for the District of Columbia Circuit affirmed the Authority's decision. 274 U. S. App. D. C. 135, 862 F. 2d 880 (1988). We granted certiorari. 493 U. S. 807 (1989).

II

The management rights provision of the Act provides, in pertinent part:

> "(a) [N]othing in this chapter [*i. e.*, the Act] shall affect the authority of any management official of any agency—
>
> . . . . .
>
> "(2) *in accordance with applicable laws*—
>
> "(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in

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[2] The FLRA also held that although Circular A–76 was a "government-wide rule or regulation" within the meaning of § 7117(a), that section of the statute did not render the union's proposal nonnegotiable because the proposal was "not inconsistent" with the Circular. 27 F. L. R. A., at 977. For reasons explained below in Part II–C, that issue is not properly before us.

> grade or pay, or take other disciplinary action against such employees;
>
> "(B) to assign work, *to make determinations with respect to contracting out*, and to determine the personnel by which agency operations shall be conducted;
>
> "(C) with respect to filling positions, to make selections for appointments from—
>
> "(i) among properly ranked and certified candidates for promotion; or
>
> "(ii) any other appropriate source . . . ." 5 U. S. C. § 7106 (emphasis added).

In the proceedings below and again before this Court, the IRS has argued that even when an agency's decision to contract out violates OMB Circular A–76 it is still a decision "in accordance with applicable laws" and is thus immunized by the foregoing provisions from contractually imposed substantive controls—rendering the proposal here nonbargainable.[3] According to the IRS, the Circular is not a law, but an internal Executive Branch directive to agency officials regarding matters of office management.

The FLRA's position is that the management rights provisions of § 7106 do not trump § 7121, which entitles the union to negotiate and enforce procedures for resolving any "grievance" as defined in § 7103—that is, any claimed "violation, misinterpretation, or misapplication of *any law, rule, or regulation* affecting conditions of employment." 5 U. S. C. § 7103(a)(9)(C)(ii) (emphasis added). Thus, according to the

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[3] A qualification to § 7106 permits contract negotiations regarding "procedures which management officials of the agency will observe in exercising" the reserved management rights. 5 U. S. C. § 7106(b)(2). Although they call our attention to this qualification, NTEU and the FLRA rightly refrain from asserting that it governs this case. The proposal at issue would enable the grievance examiner to compel the IRS to follow the cost-comparison requirements of the OMB Circular, thereby dictating the substantive criteria for the contracting-out decision. See *infra*, at 931.

FLRA, it makes no difference whether OMB Circular A–76 is an "applicable law"; so long as it is a "law, rule, *or* regulation" within the meaning of § 7103(a)(9)(C)(ii), § 7106(a) does not bar mandatory negotiation over NTEU's proposal. This, it appears, has been the FLRA's consistent position. See, *e. g.*, *AFSCME Local 3097* v. *Department of Justice, Justice Management Div.*, 31 F. L. R. A. 322, 338 (1988) (§ 7106(a) reserves to management the right to make contracting-out decisions only when they are "in accordance with all applicable laws and regulations"); *GSA* v. *American Federation of Government Employees, AFL–CIO Nat. Council 236*, 27 F. L. R. A. 3, 6 (1987) (§ 7106(a) does not preclude union from compelling agency compliance with any "applicable law, rule, or regulation").

A

We do not lightly overturn the FLRA's construction of the Act it is charged with administering. *Bureau of Alcohol, Tobacco and Firearms* v. *FLRA*, 464 U. S. 89, 97 (1983). We must accept that construction if it is a reasonable one, even though it is not the one we ourselves would arrive at. See *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–843 (1984); *NLRB* v. *Food and Commercial Workers*, 484 U. S. 112, 123 (1987). For the reasons that follow, however, we conclude that the FLRA's construction is not reasonable.

The FLRA's position is flatly contradicted by the language of § 7106(a)'s command that *"nothing in this chapter"*—*i. e.*, nothing in the entire Act—shall affect the authority of agency officials to make contracting-out determinations in accordance with applicable laws. Section 7121 is among the provisions covered by that italicized language.

The FLRA presents four arguments to overcome this plain text. First, it contends that reading § 7106(a) to supersede the grievance requirements of § 7121 would render certain portions of § 7121 superfluous.[4] Subsection 7121(c) exempts from the grievance requirements, among other things, decisions concerning appointments and certain decisions concerning suspension and removal—decisions that are also referred to as protected management rights in § 7106(a). Compare §§ 7106(a)(2)(A) and (C)(i) with §§ 7121(c)(3) and (4). The suggestion is that these § 7121(c) exclusions would have been unnecessary if the decisions in question were already insulated from the grievance requirements by § 7106(a). We disagree. Subsection 7121(c) removes these agency decisions from the coverage of *only* § 7121(a)'s negotiated grievance provisions, yet does so whether or not the decisions are made in accordance with applicable laws; § 7106(a) removes the decisions from the coverage of the *entire* Act, but only to the extent the decisions are in accordance with applicable laws. Thus, although §§ 7106(a) and 7121(c) sometimes overlap in their treatment of these enumerated agency decisions (each removes the decisions from the coverage of § 7121(a) when they are made in accordance with applicable laws), each provision has quite a distinct effect on them as well.[5]

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[4] The relevant language of § 7121 is the following:

"(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. . . .

"(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

. . . . .

"(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

"(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

"(2) retirement, life insurance, or health insurance;

"(3) a suspension or removal under section 7532 of this title;

"(4) any examination, certification, or appointment; or

"(5) the classification of any position which does not result in the reduction in grade or pay of an employee."

Second, the FLRA argues that § 7121 is among the "applicable laws" referred to in § 7106(a)(2)—so that § 7106(a) never excuses agency management from negotiating, and submitting to, grievance procedures over the exercise of reserved management rights. This cannot be the case. If the negotiation and grievance provisions of the Act, §§ 7114 and 7121, are "applicable laws" under this section, then presumably so is all the rest of the Act, there being no basis for treating those provisions specially. Thus, under the FLRA view, § 7106(a) in effect says that "nothing in this chapter shall affect the authority of management to make contracting out decisions in accordance with this chapter"—a pointless tautology. It is clear that the term "applicable laws" refers to laws *outside the Act.*

Third, the FLRA argues that the NTEU proposal is not barred by § 7106(a) because, in the words of the FLRA's opinion, its incorporation into the collective-bargaining agreement would "not itself establish any particular substantive limitation on management in the exercise of its right to make contracting-out decisions"; rather, it "would only contractually recognize and provide for the enforcement of external limitations on management's right." 27 F. L. R. A., at 980. Referring to one of its earlier decisions, the FLRA emphasizes that in a negotiated grievance proceeding the arbitrator would not second-guess the IRS on discretionary aspects of the contracting-out determination, but would only review claims "that the agency failed to comply with mandatory and nondiscretionary provisions" of the Circular. *Headquarters, 97th Combat Support Group (SAC) Blytheville Air Force Base, Ark.* v. *American Federation of Government Employees, AFL–CIO, Local 2840*, 22 F. L. R. A. 656, 661–662 (1986). He could, for example, order the agency to "reconstruct" the cost data it relied on in making a contracting decision, *ibid.*, and, if the decision was not cost justified as required by the Circular, he could order the agency to reconsider it; but he would impose no "substantive limitation" on the contracting-out decision (other than those imposed by the "law, rule, or regulation" invoked by the aggrieved employee). 27 F. L. R. A., at 980. The trouble with this argument is that it is entirely disconnected from the text of the statute. The Act does not empower unions to enforce all "external limitations" on management rights, but only limitations contained in "applicable laws." Or to put the point differently, there *are* no "external limitations" on management rights, insofar as union powers under § 7106(a) are concerned, other than the limitations imposed by "applicable laws." It makes no difference that, as a remedial matter, the arbitrator would at most order the IRS to redo its cost comparisons, and would not actually order a particular contract to be awarded or set aside. Section 7106(a) says that, insofar as union rights are concerned, it is entirely up to the IRS whether it will comply *at all* with Circular A–76's cost-comparison requirements, except to the extent that such compliance is required by an "applicable law" outside the Act.

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[5] The FLRA's position gets no support from § 7121(a)'s language providing that "*Except as provided in paragraph (2) of this subsection,* any collective bargaining agreement shall provide procedures for the settlement of grievances . . . ." (Emphasis added.) If that italicized language were construed to create the Act's only exception to the requirements of § 7121(a), then even the specific exclusions in subsection (c) of the provision would disappear.

Finally, the FLRA suggests that the term "applicable laws" in § 7106(a)(2) is coextensive with the phrase "any law, rule, or regulation" in § 7103(a)(9)(C)(ii), so that any agency contracting decision that gives rise to a grievance is by definition not "in accordance with applicable laws." The FLRA did not explicitly use this reasoning in its decision here, but it seems to have done so in other cases. See, *e. g.*, *AFSCME Local 3097* v. *Department of Justice, Justice Management*

Div., 31 F. L. R. A., at 333, 338–339. This argument is simply contrary to any reasonable interpretation of the text. A statute that in one section refers to "law, rule or regulation," and in another section to only "laws" cannot, unless we abandon all pretense at precise communication, be deemed to mean the same thing in both places. Nor can the modifier "applicable" make the difference—not only because its meaning has nothing to do with extending the coverage in this fashion, but also because the Act in several places employs the terms "rule" and "regulation" *in conjunction* with the term "applicable law." See, *e. g.*, § 7114(c)(2) (agency head shall approve collective-bargaining agreement "if the agreement is *in accordance with* the provisions of this chapter and *any other applicable law, rule, or regulation*") (emphasis added); § 7122(a) ("If upon review [of an arbitrator's decision] the Authority finds that the award is deficient—(1) because it is *contrary to any law, rule, or regulation* . . . the authority may take such action and make such recommendations concerning the award as it considers necessary, *consistent with applicable laws, rules, or regulations*") (emphasis added). There is, in short, no justification for saying that *all* "rules" and "regulations" are encompassed by the term "applicable laws." It cannot be true, therefore, that *all* actions not in accordance with a "law, rule, or regulation" under § 7103(a)(9)(C)(ii) are, by definition, also actions not "in accordance with applicable laws" in § 7106(a)(2).

B

At oral argument, counsel for NTEU urged that we could sustain the FLRA's decision on the ground that the term "applicable laws" includes at least those regulations that carry the "force of law," and that OMB Circular A–76 is such a regulation. Tr. of Oral Arg. 36. We cannot, however, adopt this ground. While we think it a permissible (though not an inevitable) construction of the statute that the term "applicable laws" in § 7106(a)(2) extends to some, but not all, rules and regulations,[6] that extension should be made, and its precise scope described, in the first instance by the FLRA—which has been proceeding until now on the mistaken assumption that § 7106(a) is irrelevant, or that "applicable laws" in § 7106(a)(2) and "any law, rule or regulation" in § 7103(a)(9)(C)(ii) are entirely synonymous. As we emphasized in *Chevron*, when an agency is charged with administering a statute, part of the authority it receives is the power to give reasonable content to the statute's textual ambiguities. 467 U. S., at 843–844. That is a task infused with judgment and discretion, requiring the "'accommodation of conflicting policies that were committed to the agency's care.'" *Id.*, at 845, quoting *United States* v. *Shimer*, 367 U. S. 374, 383 (1961). It is not a task we ought to undertake on the agency's behalf in reviewing its orders. Cf. *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88, 95 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 169 (1962).

The IRS contends that even though the term "applicable laws" includes some rules and regulations, under no reasonable construction could it include internal directives like OMB Circular A–76. We are poorly situated to evaluate that argument, since the Court of Appeals did not consider it, neither of the respondents briefed it, and counsel for respondents addressed it in only the most cursory fashion at oral argument. It is, moreover, an argument that calls for a very difficult abstract conclusion, to wit, that no conceivable reasonable interpretation of "applicable laws" could include this Circular. The Court of Appeals, on remand, may wish to enter into that inquiry, or may prefer to await the FLRA's specification, on remand, of the particular permissible interpretation of "applicable laws" (if any) it believes embraces the Circular. In any event, we decline to consider the point at this stage in the proceedings.

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[6] The IRS concedes this point. See Reply Brief for Petitioner 7; Tr. of Oral Arg. 14.

C

Finally, the IRS argues that the decision below should be reversed outright on the ground that the Union's proposal is inconsistent with the "no arbitration" language in OMB Circular A–76, and is therefore nonnegotiable under § 7117, which provides that "the duty to bargain in good faith shall, *to the extent not inconsistent with any Federal law or any Government-wide rule or regulation*, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation." 5 U. S. C. § 7117(a)(1) (emphasis added). As this argument was not raised or considered in the Court of Appeals, we do not reach it. See *EEOC* v. *FLRA*, 476 U. S. 19, 24 (1986) *(per curiam)*.[7] Nor do we decide whether the FLRA properly held Circular A–76 to be a "rule" or "regulation" within the meaning of § 7103(a)(9); although the IRS raised this question as a separate ground for reversal in its petition for certiorari, it has relied only on the "management rights" clause of § 7106(a) in its argument before this Court.

The judgment is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Because the Court remands for further proceedings I believe are unnecessary, I respectfully dissent. As I read the opinion below, the agency found OMB Circular A–76 to be an "applicable law" within the meaning of the Civil Service Reform Act of 1978's management rights provision, 5 U. S. C.

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[7] JUSTICE STEVENS contends that § 7117(a)(1) bars negotiation over the Union's proposal for yet another reason, namely, that the proposal covers a matter that is "the subject" of a "'Government-wide rule or regulation.'" *Post*, at 938 (dissenting opinion). This argument not only was not raised or considered below, but has not even been raised by the IRS here. We decline to address it.

§ 7106(a)(2), and therefore determined that the Union's proposal would not infringe management's reserved rights.[1] Since the Federal Labor Relations Authority (FLRA or Authority) could permissibly interpret the statutory term to include regulations having the "force of law" and could permissibly find that the Circular is such a regulation, as the Court acknowledges, see *ante*, at 932, I would affirm the judgment below.[2] The FLRA's decision that the Circular is an "applicable law" is entirely reasonable. The Circular was promulgated as a formal regulation, with notice published in the Federal Register and public comment invited. See Executive Office of the President, OMB Circular A-76, 44 Fed. Reg. 20556 (1979), as amended, 48 Fed. Reg. 37110 (1983), 50 Fed. Reg. 32812 (1985). It is referenced by, and its terms generally restated in, the Federal Acquisition Regulations, codified at 48 CFR pt. 7, subpt. 7.3 (1988). By its terms, agency compliance is mandatory and enforced. OMB Circular A-76, Supp. Intro. and I-14, I-15 (rev. Aug. 4, 1983). Hence, I would uphold the FLRA's conclusion that the Circular is an "applicable law" within the meaning of § 7106(a)(2).[3]

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[1] See 27 F. L. R. A. 976, 979 (1987) (the Union proposal "require[s] nothing that is not required by section 7106(a)(2) of the Statute itself, namely, that determinations as to contracting-out must be made 'in accordance with applicable laws'").

[2] I am inclined to agree with the position taken by the Deputy Solicitor General at oral argument, see Tr. of Oral Arg. 14, that "applicable laws" include not only statutes but also regulations having the force of law, and that the Administrative Procedure Act (APA) provides the relevant measure. See *id.*, at 47 ("[I]f a private party could bring an APA action, that would be very strong, if not conclusive, evidence that . . . you are dealing with an applicable law"). Under the APA, an agency action inconsistent with any valid and binding rule or regulation is actionable by anyone "aggrieved" by it. See 5 U. S. C. §§ 702, 706(2)(A); *Center for Auto Safety* v. *Dole*, 264 U. S. App. D. C. 219, 223, 235, 828 F. 2d 799, 803, 815 (1987); *Padula* v. *Webster*, 261 U. S. App. D. C. 365, 368, 822 F. 2d 97, 100 (1987).

[3] I do not agree with JUSTICE STEVENS that, even if OMB Circular A-76 is an applicable law, § 7117(a)(1) precludes bargaining over the Union

The Court finds the FLRA's interpretation of "applicable laws" unreasonable, not because it is an implausible reading in itself, but because it is indistinguishable from the Authority's interpretation of the phrase "law, rule, or regulation" which is contained in a different section of the Civil Service Reform Act of 1978. See *ante*, at 931–932. I suspect the Court reads too much into the difference in language between "applicable laws" in § 7106(a)(2) and "law, rule, or regulation" in § 7103(a)(9)(C)(ii). But, in any event, I understand the Court's decision to say only that the two phrases are not synonymous. *Ibid.* If the FLRA, in fact, has employed the same definition for the two phrases, which is arguable, the Authority's error most likely was to embrace too restrictive a view of the scope of "law, rule, or regulation."[4] Thus on remand the FLRA is free to interpret "ap-

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proposal because the Circular is also a "'Government-wide rule or regulation.'" See *post*, at 938. Section 7117(a)(1) provides:

"[T]he duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation."

I agree with JUSTICE STEVENS that the Circular is a Government-wide rule or regulation, but I do not read the provision to bar a union proposal that asks only that an existing rule or regulation be incorporated in its entirety into the union's collective-bargaining agreement. The function of § 7117(a)(1) appears to be to insulate from the bargaining process union efforts to change anything that has already been settled by those with authority over the agency—*e. g.*, Congress, the President, or OMB. The two clauses in § 7117(a)(1) explain that a union proposal in direct conflict with, or covering the same ground as, a Government-wide rule or regulation is not bargainable. They establish a kind of pre-emption by which agencies may not adopt rules where those with greater authority have adopted a contrary rule or occupied the field. Thus, no purpose is served by including the rule or regulation itself within "matters which are the subject of" any Government-wide rule or regulation. Incorporating a Government-wide rule into a collective-bargaining agreement does not place the agency at odds with any greater authority.

[4] That the Authority found below that OMB Circular A–76 is a "law, rule, or regulation" under § 7103(a)(9)(C)(ii), see 27 F. L. R. A., at 978,

plicable laws" to cover not only statutes, but also regulations and rules that are binding on the agency exercising its reserved rights. See n. 2, *supra*. The Authority is also free to interpret "law, rule, or regulation" to cover these and more—for instance, nonbinding policy statements and unpublished internal agency guidelines.

Finally, I take issue with the Court's expansive view of the management rights provision as abrogating any union rights vis-à-vis decisions such as contracting out, so long as agency decisions are made consistently with applicable laws. See *ante*, at 931. Section 7106(a) does not purport to make other provisions of the Act *wholly inapplicable* to the enumerated subject areas. It says only that nothing in the statute "*shall affect* the authority of any management official of any agency" to make certain types of decisions. (Emphasis added.) An exercise of union rights that does not *affect* management's existing authority is fully consistent with this provision. Insofar as the Union proposal would require merely what is already required by OMB Circular A–76, it would not affect the Internal Revenue Service's authority to make contracting out decisions. Therefore it would not infringe the agency's reserved rights. Because I do not read the Authority's decision as clearly relying on this ground, I do not think it necessary for the Court to have reached it.

JUSTICE STEVENS, dissenting.

If OMB Circular A–76 (rev. Aug. 4, 1983) is not an "applicable law" within the meaning of 5 U. S. C. § 7106(a)(2), the plain language of that section requires an outright reversal of

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does not undermine the validity of its decision even if its definition of "law, rule, or regulation" was too narrow. If the Circular fit within an overly restrictive definition of the phrase, *a fortiori*, it must fit within an appropriately broad definition. Moreover, the FLRA's finding that the Union's proposal did not interfere with reserved management rights because OMB Circular A–76 is encompassed by the term "applicable laws" is sufficient ground in itself for the decision and was relied on as such by the Authority. See 27 F. L. R. A., at 979.

the Court of Appeals' decision. I have previously endorsed the view that the Circular is not an applicable law, and I still think that conclusion is correct. *EEOC* v. *FLRA*, 476 U. S. 19, 27 (1986) (dissenting opinion); see also *U. S. Dept. of Health and Human Services* v. *FLRA*, 844 F. 2d 1087 (CA4 1988) (en banc). But even if the Circular were an "applicable law," it would then certainly also be "a Government-wide rule or regulation" within the meaning of § 7117(a)(1). Under the plain language of that section, the duty to bargain does not extend to matters which are the subject of such a regulation. By seeking to bargain about enforcement of the Circular, the Union seeks to bargain about matters subject to the Circular. Cf. 844 F. 2d, at 1099. I am therefore persuaded that whether or not one interprets Circular A-76 as an applicable law, either § 7106(a)(2) or § 7117(a)(1) requires reversal. To the extent that the Court instead leaves the issue open on remand, I respectfully dissent.

REPORTER'S NOTE

The next page is purposely numbered 1001. The numbers between 938 and 1001 were intentionally omitted, in order to make it possible to publish the orders with *permanent* page numbers, thus making the official citations available upon publication of the preliminary prints of the United States Reports.

ORDERS FOR FEBRUARY 26 THROUGH APRIL 16, 1990

Certiorari Granted—Vacated and Remanded

No. 88–849. Action Alliance of Senior Citizens of Greater Philadelphia et al. *v.* Sullivan, Secretary of Health and Human Services, et al. C. A. D. C. Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Dole* v. *Steelworkers*, *ante*, p. 26. Reported below: 269 U. S. App. D. C. 463, 846 F. 2d 1449.

Miscellaneous Orders. (See also No. 65, Orig., *ante*, p. 111.)

No. D–801. In re Disbarment of Jacobson. Disbarment entered. [For earlier order herein, see 492 U. S. 931.]

No. D–816. In re Disbarment of Chandler. Disbarment entered. [For earlier order herein, see 493 U. S. 949.]

No. D–818. In re Disbarment of Saul. Disbarment entered. [For earlier order herein, see 493 U. S. 949.]

No. D–829. In re Disbarment of Isis. Disbarment entered. [For earlier order herein, see 493 U. S. 961.]

No. D–834. In re Disbarment of Raikos. Disbarment entered. [For earlier order herein, see 493 U. S. 961.]

No. D–836. In re Disbarment of Evans. Disbarment entered. [For earlier order herein, see 493 U. S. 972.]

No. D–841. In re Disbarment of Farley. Disbarment entered. [For earlier order herein, see 493 U. S. 973.]

No. D–863. In re Disbarment of Morris. It is ordered that Jerrold L. Morris, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–864. In re Disbarment of Rocker. It is ordered that Jonathan Samuel Rocker, of Cleveland, Ohio, be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–865. In re Disbarment of Boyce. It is ordered that Earl Rumsey Boyce, of Palm Beach, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–866. In re Disbarment of Silveira. It is ordered that Frank Diaz Silveira, of Coral Gables, Fla., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–867. In re Disbarment of Digges. It is ordered that Edward S. Digges, Jr., of Rock Hall, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–868. In re Disbarment of Molony. It is ordered that Gerard E. Molony, of Upper Nyack, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–869. In re Disbarment of Bracken. It is ordered that Martin Lawrence Bracken, of Mineola, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–870. In re Disbarment of Tschirhart. It is ordered that William Henry Tschirhart, of Clinton, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–871. In re Disbarment of Price. It is ordered that William Herbert Price, of San Antonio, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 83–243. Brown & Root, Inc., et al. *v.* Thornton et al., 464 U. S. 1052. Motion of respondent Billy Thornton for award of attorney's fees denied without prejudice.

No. 88–931. CRANDON ET AL. *v.* UNITED STATES; and

No. 88–938. BOEING CO., INC. *v.* UNITED STATES. C. A. 4th Cir. [Certiorari granted, 490 U. S. 1003.] Motion of the Solicitor General for leave to file a supplemental brief after argument granted.

No. 89–6605. IN RE GODWIN. Petition for writ of habeas corpus denied.

No. 89–6402. IN RE EVEGELATOS. Petition for writ of mandamus denied.

Certiorari Granted

No. 89–994. WEST VIRGINIA UNIVERSITY HOSPITALS, INC. *v.* CASEY, GOVERNOR OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari granted. Reported below: 885 F. 2d 11.

No. 89–1063. FIRSTIER MORTGAGE CO., AKA REALBANC, INC. *v.* INVESTORS MORTGAGE INSURANCE CO. C. A. 10th Cir. Certiorari granted.

No. 89–1158. MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF TORREGANO *v.* APEX MARINE CORP. ET AL. C. A. 5th Cir. Certiorari granted. Reported below: 882 F. 2d 976.

Certiorari Denied

No. 88–1075. ASSOCIATED BUILDERS & CONTRACTORS, INC., ET AL. *v.* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, ET AL. (two cases). C. A. 3d Cir. Certiorari denied. Reported below: 862 F. 2d 63 (first case); 855 F. 2d 108 (second case).

No. 89–344. WOODWARD *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 871 F. 2d 1068.

No. 89–564. GLOSEMEYER ET AL. *v.* MISSOURI-KANSAS-TEXAS RAILROAD ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 2d 316.

No. 89–777. UNITED STATES GYPSUM CO. *v.* WESLEY THEOLOGICAL SEMINARY OF THE UNITED METHODIST CHURCH. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 360, 876 F. 2d 119.

No. 89–781. TOWN OF HUNTINGTON ET AL. *v.* STONE, SECRETARY OF THE ARMY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 648.

No. 89–835. ANTONIU *v.* SECURITIES AND EXCHANGE COMMISSION. C. A. 8th Cir. Certiorari denied. Reported below: 877 F. 2d 721.

No. 89–876. BEN-SHALOM *v.* STONE, SECRETARY OF THE ARMY, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 881 F. 2d 454.

No. 89–878. KNIGHT *v.* CENTRAL INTELLIGENCE AGENCY. C. A. 5th Cir. Certiorari denied. Reported below: 872 F. 2d 660.

No. 89–898. BYWATER NEIGHBORHOOD ASSN. *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 879 F. 2d 165.

No. 89–997. JACKSON ET AL. *v.* RUSSELL. Ct. App. Ind. Certiorari denied. Reported below: 533 N. E. 2d 153.

No. 89–1046. FRATES ET AL. *v.* WEINSHIENK, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 882 F. 2d 1502.

No. 89–1058. PORTER ET AL. *v.* CITY OF ATLANTA. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 526, 384 S. E. 2d 631.

No. 89–1068. ROSENBAUM *v.* ROSENBAUM ET AL. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 184 Ill. App. 3d 987, 541 N. E. 2d 872.

No. 89–1073. FANT *v.* BONANNO, CLERK, CLEVELAND MUNICIPAL COURT. Sup. Ct. Ohio. Certiorari denied. Reported below: 45 Ohio St. 3d 707, 544 N. E. 2d 694.

No. 89–1086. KLUMPNER, A MINOR, BY KAHN, HER GUARDIAN AD LITEM *v.* KLUMPNER. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 182 Ill. App. 3d 22, 537 N. E. 2d 914.

No. 89–1088. HELENA MARINE SERVICE, INC., ET AL. *v.* ST. PAUL FIRE & MARINE INSURANCE CO. ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 2d 391.

No. 89–1089. ATLANTIC RICHFIELD CO. *v.* VAN VRANKEN ET AL. Temp. Emerg. Ct. App. Certiorari denied. Reported below: 890 F. 2d 421.

No. 89–1090. ELLIS *v.* RINGGOLD SCHOOL DISTRICT. C. A. 3d Cir. Certiorari denied. Reported below: 877 F. 2d 54.

No. 89–1091. SOBOL, COMMISSIONER OF THE NEW YORK STATE EDUCATION DEPARTMENT *v.* BURR, BY HIS PARENTS AND NEXT FRIENDS, BURR ET UX. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 258.

No. 89–1109. MASON *v.* CITY OF GASTONIA, NORTH CAROLINA, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1389.

No. 89–1116. BISHOP *v.* OASIS OIL CO. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 416.

No. 89–1135. WEBER ET AL. *v.* KLUGE ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–1143. SUNG MAN KIM ET UX. *v.* SOO AN LEE ET UX. Ct. App. D. C. Certiorari denied.

No. 89–1146. BROECKL ET AL. *v.* CHICAGO PARK DISTRICT. Sup. Ct. Ill. Certiorari denied. Reported below: 131 Ill. 2d 79, 544 N. E. 2d 792.

No. 89–1171. GONZALEZ-SENTI *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 886 F. 2d 1323.

No. 89–1186. FLOCA *v.* HOMECARE HEALTH SERVICES, INC., ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 883 F. 2d 71.

No. 89–1206. ELKINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 885 F. 2d 775.

No. 89–6005. WILKERSON *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 89–6140. NIVICA *v.* UNITED STATES; and
No. 89–6360. WELLINGTON *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 887 F. 2d 1110.

No. 89–6186. GARCIA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89–6196. Dennis *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1397.

No. 89–6292. Dubov *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1025.

No. 89–6331. Woods *v.* United States. C. A. 10th Cir. Certiorari denied. Reported below: 888 F. 2d 653.

No. 89–6357. Slone *v.* Sowders, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 76.

No. 89–6362. Swartz *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. Reported below: 876 F. 2d 657.

No. 89–6370. Bass *v.* Rhode, Warden, et al. C. A. 9th Cir. Certiorari denied. Reported below: 880 F. 2d 1323.

No. 89–6371. Scott *v.* Sumner et al. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 1089.

No. 89–6373. Keyes *v.* San Francisco Probation Department. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–6376. Cole *v.* Reed. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89–6378. Kim *v.* California et al. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–6391. Akmansoy *v.* Klevenhagen et al. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 575.

No. 89–6392. Horne *v.* Georgia. Sup. Ct. Ga. Certiorari denied.

No. 89–6393. Lee *v.* California. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–6395. McClain *v.* Mitchell et al. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 1384.

No. 89–6396. McCone *v.* Birge et al. C. A. 10th Cir. Certiorari denied.

No. 89–6397. Bond *v.* Dunn, Deputy Warden. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 289.

No. 89-6398. Bond *v.* Shams et al. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 289.

No. 89-6401. Tygart *v.* Armontrout, Warden. C. A. 8th Cir. Certiorari denied.

No. 89-6409. Wesselman *v.* Seabold, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 1078.

No. 89-6411. Reyna *v.* Texas. Ct. App. Tex., 3d Dist. Certiorari denied.

No. 89-6415. Brown *v.* Tate, Superintendent, Chillicothe Correctional Institution. C. A. 6th Cir. Certiorari denied.

No. 89-6416. Lepiscopo *v.* Reed. C. A. 10th Cir. Certiorari denied.

No. 89-6420. Visser *v.* United States Court of Appeals for the District of Columbia Circuit. C. A. D. C. Cir. Certiorari denied.

No. 89-6424. Lockhart *v.* Nagle, Warden, et al. C. A. 11th Cir. Certiorari denied. Reported below: 890 F. 2d 1166.

No. 89-6439. Goodstein *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 883 F. 2d 1362.

No. 89-6449. Elkayam *v.* Sibert et al. C. A. 5th Cir. Certiorari denied. Reported below: 869 F. 2d 1485.

No. 89-6463. Bryant *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1084.

No. 89-6468. Vasquez *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 87.

No. 89-6471. Dedrick *v.* New Hampshire. Sup. Ct. N. H. Certiorari denied. Reported below: 132 N. H. 218, 564 A. 2d 423.

No. 89-6489. Sherdil *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89-6507. Dupin *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 415.

No. 89–6510. BURNETTE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 876 F. 2d 107.

No. 89–6514. EUFRACIO-TORRES *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 266.

No. 89–6515. WARREN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1097.

No. 89–6516. BUTLER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89–6517. MARTIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 266, 889 F. 2d 281.

No. 89–6530. CRUZ *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 854 F. 2d 1280.

No. 89–6535. BARNHART *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1374.

No. 89–6539. TWITTY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 541 A. 2d 612.

No. 89–6545. SISTRUNK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–6559. HARRIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1089.

No. 89–6562. MOLINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 1395.

No. 89–6563. BONGA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1096.

No. 89–6577. HANSEN *v.* SOUTH CAROLINA ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 286.

No. 89–6591. KENNEDY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 890 F. 2d 1056.

No. 89–888. NEW HAMPSHIRE *v.* DEDRICK. Sup. Ct. N. H. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 132 N. H. 218, 564 A. 2d 423.

No. 89–5295. MALLETT *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. JUSTICE BLACKMUN dissents. Reported below: 769 S. W. 2d 77.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to consider whether a trial court's decision to transfer a capital trial of an Afro-American defendant to a county with no residents of the defendant's race violates the Equal Protection Clause or the Sixth Amendment's fair cross section requirement, as applied to the States by the Fourteenth Amendment. Just as state prosecutors may not use peremptory challenges to exclude members of the defendant's race from the jury, *Batson* v. *Kentucky*, 476 U. S. 79 (1986), state trial courts may not transfer venue of the trial to accomplish the same result by another means.

Jerome Mallett, an Afro-American, was arrested for the murder of a white police officer that occurred in Perry County, Missouri. In 1980, over 1,100 Afro-Americans lived in Perry County, out of a total population of 16,784. Mallett was originally brought to trial in that county, but he requested a change of venue because of prejudicial pretrial publicity. Both the defense and prosecution offered suggestions for an appropriate venue; defense counsel specifically expressed concern that some members of Mallett's race reside in whatever county the court chose.

The judge ordered the case transferred to Schuyler County, a location that neither attorney had suggested. According to the 1980 census figures, Schuyler County contained 4,964 whites and 3 Afro-Americans; at the time of the trial, however, there were no Afro-Americans in the county. Mallett was convicted and sentenced to death by an all-white jury in Schuyler County. His conviction was upheld on direct appeal. In his petition for state post-conviction relief, Mallett argued that the Perry County judge's decision to transfer venue to Schuyler County violated his rights under the Equal Protection and Due Process Clauses. After a hearing, a special judge ordered a new trial on both grounds; the State Supreme Court reversed his decision and affirmed the original sentence. 769 S. W. 2d 77 (1989) (en banc).

In *Batson* v. *Kentucky*, *supra*, at 86, we held that "[p]urposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." To make out a prima facie case of purposeful discrimination, a defendant must establish first that he is a member of a cognizable racial group and that the state has acted to remove members of that race from the venire; second, that the procedure used by the state permits those "'who are of a mind to discriminate'" to do so; and third, that the facts and circumstances of the case raise the inference that the state acted in a discriminatory manner. 476 U. S., at 96. Once the defendant has established a prima facie case, the burden shifts to the state to present a neutral explanation to rebut the inference. *Id.*, at 97.

Properly applying *Batson* to these facts, the special judge found purposeful discrimination in the court's transfer decision. Specifically, he found that

> "'1) the case involves a cross-racial murder of a state trooper; 2) the decision of [the Perry County judge] was made without giving counsel an opportunity to object; 3) counties which were of equal convenience to witnesses; equally free of pretrial publicity; of equal, greater or less distance; and included blacks were tendered by the defense and prosecution; 4) no specific or compelling reason existed to send the case to Schuyler County; 5) there were no blacks living in Schuyler County at the time of trial; 6) movant is a black man; 7) the defense expressed concern that the county chosen include blacks.'" 769 S. W. 2d, at 81.

These facts give rise to a prima facie case of purposeful discrimination. The court's transfer decision reduced the number of Afro-Americans on Mallett's venire; the virtually unrestricted discretion of the trial judge to make the venue determination presented an opportunity to discriminate; and the judge transferred the case to a county with no members of Mallett's race. The trial judge failed to offer a "specific or compelling" neutral explanation for the transfer. *Ibid.*

In light of these circumstances, *Batson* requires an examination of the trial court's justification for transferring venue in a manner that discriminated against potential Afro-American jurors. In this case, the examination was conducted by a special judge in a postconviction hearing. I do not believe that such a hearing is necessary. A reviewing court can assess the record of the trial to determine whether the judge adequately explained his decision to transfer venue to a certain county. Such review is possible in this context because a judge's rationale is openly disclosed contemporaneously with his decision, unlike a prosecutor's rationale for his exercise of peremptory challenges. Here the special judge's finding that the transfer decision was racially motivated is amply supported by the record. Accordingly, Mallett's conviction and sentence must be reversed.

Mallett also argues that the transfer of his case to Schuyler County deprived him of due process, an argument the court below characterized as a challenge under the Sixth Amendment's fair cross section guarantee. 769 S. W. 2d, at 79–80. The fair cross section requirement has been applied to the States through the Due Process Clause of the Fourteenth Amendment. *Taylor* v. *Louisiana*, 419 U. S. 522, 526 (1975). Although a defendant has no right to a jury of any particular racial composition, we have long held that the State cannot act so as to deprive a defendant of his right to a venire that is "truly representative of the community." *Smith* v. *Texas*, 311 U. S. 128, 130 (1940). Mallett was originally brought to trial in a community with a significant Afro-American population and asked for his case to be transferred to a county with Afro-American residents. Yet the State chose Schuyler County as the location for the trial, a venue that included no members of Mallett's race. Although the jury pool may have been representative of Schuyler County, it was not representative of the community in which Mallett was charged, or even of the broader community comprised of the counties to which he sought transfer. In such a situation, determining which community defines the relevant universe for Sixth Amendment purposes is crucial to the adjudication of claims like Mallett's. I would grant the petition to resolve this issue as well.

The State's only response to both of Mallett's contentions is that they cannot be considered because a decision adopting either argument would create "new law" that would not be applicable retroactively in a state postconviction relief proceeding. As support, it cites this Court's recent opinion in *Teague* v. *Lane*, 489 U. S. 288 (1989). The State argues further that this Court is precluded from even addressing the merits of Mallett's claims because, under *Teague*, retroactivity is a threshold matter. *Id.*, at 300–301. This response is unpersuasive. Mallett's equal protection argument is "dictated by precedent existing at the time the defendant's conviction became final." *Id.*, at 301 (emphasis omitted). The argument flows necessarily from the language in *Batson* stating that purposeful discrimination is impermissible in jury selection procedures. *Batson* v. *Kentucky*, 476 U. S., at 86–87. More importantly, it is not evident to me that *Teague* applies to our review of state postconviction proceedings in which the state courts have addressed the merits of the petitioner's claims. Certainly, the issue is one that merits review by this Court.

When it transferred this capital murder trial to a county with no inhabitants of Mallett's race, the trial court violated Jerome Mallett's fundamental equal protection rights. The transfer is particularly appalling because the defense counsel emphasized to the trial court that the venue should be one where members of Mallett's race resided, and because the judge could have selected other counties in Missouri that satisfied this valid concern. Accordingly, I dissent.

No. 89–6390. ROMERO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 871.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

Rehearing Denied

No. 88–1400. FRANCHISE TAX BOARD OF CALIFORNIA ET AL. *v.* ALCAN ALUMINIUM LTD. ET AL., 493 U. S. 331;

No. 89–508. UNITED STATES CAN CO. ET AL. *v.* INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS ET AL., 493 U. S. 1019;

No. 89–788. VENUS INDEPENDENT SCHOOL DISTRICT ET AL. *v.* SHELLY C., BY NEXT FRIENDS, SHELBIE C. ET UX., 493 U. S. 1024;

No. 89–796. IN RE POLYAK, 493 U. S. 1017;

No. 89–5879. THAKKAR *v.* MARTIN, 493 U. S. 1027;

No. 89–6061. RAWLS *v.* UNITED STATES, 493 U. S. 1013; and

No. 89–6124. FERENC *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL., 493 U. S. 1060. Petitions for rehearing denied.

No. 89–741. PRICE *v.* VIKING PENGUIN, INC., ET AL., 493 U. S. 1036; and

No. 89–5666. LACKLAND *v.* J. C. PENNEY CO., 493 U. S. 1036. Petitions for rehearing denied. JUSTICE BLACKMUN took no part in the consideration or decision of these petitions.

MARCH 5, 1990

Certiorari Granted–Reversed. (See No. 89–5999, *ante*, p. 541.)

Certiorari Granted–Vacated and Remanded

No. 88–986. FIELDS *v.* DURHAM ET AL. C. A. 4th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zinermon* v. *Burch*, *ante*, p. 113. Reported below: 856 F. 2d 655.

No. 88–6104. HAWKINS *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Selvage* v. *Collins*, *ante*, p. 108, and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Reported below: 862 F. 2d 487.

No. 88–6347. BRIDGE *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Selvage* v. *Collins*, *ante*, p. 108, and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Reported below: 856 F. 2d 712, 860 F. 2d 162, and 863 F. 2d 370.

No. 89–486. HERNANDEZ *v.* RICE, SECRETARY OF THE AIR FORCE. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded to the Court of Appeals to consider whether or not, in all of the circumstances of the case, receipt of the nondefective complaint by the District Court clerk's office constituted a "filing" for the purposes of 42 U. S. C. §2000e–16(c) (1982 ed.). Reported below: 866 F. 2d 800.

No. 89–532. PEAT MARWICK MAIN & CO. *v.* HOLLOWAY ET AL. C. A. 10th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Reves* v. *Ernst & Young*, *ante*, p. 56. Reported below: 879 F. 2d 772.

No. 89–599. EASTER HOUSE *v.* FELDER ET AL. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Zinermon* v. *Burch*, *ante*, p. 113. Reported below: 879 F. 2d 1458.

Miscellaneous Orders

No. – – ——. CITY OF RANCHO CUCAMONGA ET AL. *v.* EDWARDS THEATRES CIRCUITS, INC.; and

No. – – ——. MANNING *v.* UNITED STATES ENVIRONMENTAL PROTECTION AGENCY. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. – – ——. THOMPSON *v.* COVINGTON HOUSING DEVELOPMENT. Motion to direct the Clerk to file petition for writ of certiorari denied.

No. D–847. IN RE DISBARMENT OF NIXON. Disbarment entered. [For earlier order herein, see 493 U. S. 1000.]

No. D–848. IN RE DISBARMENT OF WILLIAMS. Disbarment entered. [For earlier order herein, see 493 U. S. 1000.]

No. D–872. IN RE DISBARMENT OF JOYCE. It is ordered that Thomas M. Joyce, of Chicago, Ill., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–873. IN RE DISBARMENT OF SANDBORN. It is ordered that Michael Young Sandborn, of Lansing, Mich., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–874. In re Disbarment of Peiper. It is ordered that Jordan L. Peiper, of Philadelphia, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–875. In re Disbarment of Stoner. It is ordered that Carl B. Stoner, Jr., of Harrisburg, Pa., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–931. Crandon et al. *v.* United States; and

No. 88–938. Boeing Co., Inc. *v.* United States. C. A. 4th Cir. [Certiorari granted, 490 U. S. 1003.] Motion of petitioners for leave to file a supplemental brief after argument granted.

No. 89–542. Perpich, Governor of Minnesota, et al. *v.* Department of Defense et al. C. A. 8th Cir. [Certiorari granted, 493 U. S. 1017.] Motion of National Guard Association of the United States et al. for leave to participate in oral argument as *amici curiae*, for divided argument, and for additional time for argument denied.

No. 89–700. Astroline Communications Company Limited Partnership *v.* Shurberg Broadcasting of Hartford, Inc., et al. C. A. D. C. Cir. [Certiorari granted, 493 U. S. 1018.] Motion of Committee to Promote Diversity for leave to file a brief as *amicus curiae* granted.

No. 89–742. Collins, Director, Texas Department of Criminal Justice, Institutional Division *v.* Youngblood. C. A. 5th Cir. [Certiorari granted *sub nom. Lynaugh* v. *Youngblood*, 493 U. S. 1001.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 89–6428. In re Madson. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 89–1106. Trinova Corp. *v.* Michigan Department of Treasury. Sup. Ct. Mich. Certiorari granted. Reported below: 433 Mich. 141, 445 N. W. 2d 428.

No. 89–5120. Perry *v.* Louisiana. 19th Jud. Dist. Ct., Crim. Section V, Parish of East Baton Rouge, La. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted.

Certiorari Denied

No. 88–6525. CHARTERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 863 F. 2d 302.

No. 88–6972. SPENCER *v.* LEE ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 864 F. 2d 1376.

No. 89–473. DOODY ET AL. *v.* SINALOA LAKE OWNERS ASSN., INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 882 F. 2d 1398.

No. 89–746. GENE R. SMITH CORP. *v.* TERRY'S TRACTOR, INC., ET AL. Ct. App. Cal., 4th App. Dist. Certiorari denied. Reported below: 209 Cal. App. 3d 951, 257 Cal. Rptr. 598.

No. 89–809. PAINEWEBBER INC. ET AL. *v.* FRYE. C. A. 5th Cir. Certiorari denied. Reported below: 877 F. 2d 396.

No. 89–829. DEWITT BANK & TRUST CO., CONSERVATOR OF THE ESTATE OF MCNEELY *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 2d 246.

No. 89–922. PATEL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 292.

No. 89–928. CEMENTOS GUADALAJARA, S. A., ET AL. *v.* UNITED STATES ET AL. C. A. Fed. Cir. Certiorari denied. Reported below: 879 F. 2d 847.

No. 89–1087. JOHNSON *v.* BANK OF AMERICA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–1096. LAWLER *v.* PAULISSEN ET UX. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 575.

No. 89–1100. ROBINSON *v.* POURCIAU ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–1103. GOULD INC. ET AL. *v.* MINISTRY OF DEFENSE OF THE ISLAMIC REPUBLIC OF IRAN. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 1357.

No. 89–1119. HERRING ET AL. *v.* DELTA AIR LINES, INC., ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 1020.

No. 89–1120. CATALINA *v.* CITY OF COLUMBUS, OHIO, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1086.

No. 89–1121. WEBB *v.* MERCK & CO., INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 264.

No. 89–1122. CHRISTENSEN *v.* PETTEY ET AL. Ct. App. Utah. Certiorari denied.

No. 89–1126. SUEHL ET AL. *v.* IOWA. C. A. 8th Cir. Certiorari denied.

No. 89–1137. RANNELS *v.* MERIDIAN BANCORP, INC. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1331.

No. 89–1154. SHELL OFFSHORE INC. *v.* GATES ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 215.

No. 89–1162. CROMPTON, DBA PRO-PAR INDUSTRIES, INC. *v.* GENERAL MOTORS CORP. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 580.

No. 89–1165. SOUTHWEST FOREST INDUSTRIES, INC. *v.* SUTTON. C. A. 10th Cir. Certiorari denied. Reported below: 868 F. 2d 352.

No. 89–1234. PELULLO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 330.

No. 89–1250. MANZI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Reported below: 888 F. 2d 204.

No. 89–1252. BASALYGA ET AL. *v.* PENNSYLVANIA ET AL. Pa. Commw. Ct. Certiorari denied. Reported below: 123 Pa. Commw. 150, 553 A. 2d 496.

No. 89–1269. METRO-GOLDWYN-MAYER, INC., ET AL. *v.* FRANK MUSIC CORP. ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1545.

No. 89–5844. MCKINNEY *v.* MISSISSIPPI. Sup. Ct. Miss. Certiorari denied.

No. 89–6156. VELASQUEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 885 F. 2d 1076.

No. 89–6157. MELO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1082.

No. 89–6226. RIVERA *v.* UNITED STATES; and
No. 89–6266. BURGESS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 544.

No. 89–6229. RESTREPO *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1387.

No. 89–6238. TOWNSEND *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 130.

No. 89–6239. GREENE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 1299.

No. 89–6252. FRANK *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1379.

No. 89–6327. TUTTLE *v.* UTAH. Sup. Ct. Utah. Certiorari denied. Reported below: 780 P. 2d 1203.

No. 89–6338. BROOKS *v.* GEORGIA. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 562, 385 S. E. 2d 81.

No. 89–6351. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1390.

No. 89–6394. HARRIS *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 129 Ill. 2d 123, 544 N. E. 2d 357.

No. 89–6418. MORRIS *v.* DEPARTMENT OF SOCIAL SERVICES. Sup. Ct. Mich. Certiorari denied. Reported below: 432 Mich. 894.

No. 89–6432. STREET *v.* JABE, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89–6436. ARMAN *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 131 Ill. 2d 115, 545 N. E. 2d 658.

No. 89–6437. BRUMMELL *v.* TRICKEY ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89–6440. RODMAN *v.* BOWER, SUPERINTENDENT, SOUTHEASTERN CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1316.

No. 89-6458. MacGuire *v.* Miller, Shine & Bryan et al. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 584.

No. 89-6508. Cox *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 876 F. 2d 900.

No. 89-6531. Franks *v.* Bauer, Police Chief, et al. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 272.

No. 89-6536. Cantu *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89-6548. Harrison *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 89-6564. Land *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 889 F. 2d 1096.

No. 89-6582. Curren *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 194, 888 F. 2d 891.

No. 89-6598. Peoples *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 80.

No. 89-6603. Doria *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 296.

No. 89-6606. Barnes *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 890 F. 2d 545.

No. 89-6656. Sakovich *v.* Armstrong World Industries. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1174, 549 N. E. 2d 361.

No. 89-6657. Sakovich *v.* Dodt. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 174 Ill. App. 3d 649, 529 N. E. 2d 258.

No. 89-1075. A. A. Poultry Farms, Inc., et al. *v.* Rose Acre Farms, Inc. C. A. 7th Cir. Certiorari denied. Justice White would grant certiorari. Reported below: 881 F. 2d 1396.

No. 89-6219. Byrd *v.* Armontrout, Warden, et al. C. A. 8th Cir.;

No. 89–6404. Townsend *v.* Indiana. Sup. Ct. Ind.; and
No. 89–6405. Starr *v.* Arkansas. Sup. Ct. Ark. Certiorari denied. Reported below: No. 89–6219, 880 F. 2d 1; No. 89–6404, 533 N. E. 2d 1215; No. 89–6405, 300 Ark. xxiii.

Justice Brennan and Justice Marshall, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–6592. Stewart *v.* Washington. Sup. Ct. Wash. Certiorari denied. Justice Brennan and Justice White would grant certiorari. Reported below: 113 Wash. 2d 462, 780 P. 2d 844.

Rehearing Denied

No. A–259. Fazzini *v.* Gluch et al., 493 U. S. 1014;
No. 89–415. Brooks *v.* Town of Ashland, 493 U. S. 936;
No. 89–5506. Hakim *v.* Department of Civil Rights et al., 493 U. S. 940;
No. 89–5827. Morgan *v.* Turnage, 493 U. S. 1047;
No. 89–5832. Perry *v.* Ball, Secretary of the Navy, 493 U. S. 1027;
No. 89–6065. Bilal *v.* Lockhart, Director, Arkansas Department of Correction, 493 U. S. 1032;
No. 89–6067. Visser *v.* Court of Appeal of California, Second Appellate District, 493 U. S. 1048;
No. 89–6098. Martin *v.* United States Court of Appeals for the Third Circuit, 493 U. S. 1048; and
No. 89–6224. Bond *v.* Raikes, Judge, Nelson Circuit Court, 493 U. S. 1062. Petitions for rehearing denied.

March 6, 1990

Miscellaneous Order

No. A–606 (89–6785). Heishman *v.* California. Sup. Ct. Cal. Application for stay of execution of sentence of death, presented to Justice O'Connor, and by her referred to the Court, granted pending the disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

MARCH 16, 1990

Miscellaneous Order

No. 89–1433. UNITED STATES *v.* EICHMAN ET AL. Appeal from D. C. D. C.; and

No. 89–1434. UNITED STATES *v.* HAGGERTY ET AL. Appeal from D. C. W. D. Wash. Motion of the Solicitor General to expedite consideration of the jurisdictional statements granted to the extent that motions to dismiss or affirm shall be received by the Clerk on or before noon, Monday, March 26, 1990.

MARCH 19, 1990

Certiorari Granted—Vacated and Remanded

No. 88–6277. MCLAUGHLIN *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 68, 372 S. E. 2d 49.

No. 88–6348. LLOYD *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 622, 374 S. E. 2d 277.

No. 88–6450. ALLEN *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 208, 372 S. E. 2d 855.

No. 88–6480. CUMMINGS *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 181, 372 S. E. 2d 541.

No. 88–6682. BARNES *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 407, 373 S. E. 2d 400.

No. 88–6683. FULLWOOD *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 371, 373 S. E. 2d 518.

No. 88–6684. HUNT *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 323 N. C. 407, 373 S. E. 2d 400.

No. 88–7306. GREENE *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 324 N. C. 1, 376 S. E. 2d 430.

No. 89–1297. INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 406, ET AL. *v.* GUIDRY. C. A. 5th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Breininger* v. *Sheet Metal Workers,* 493 U. S. 67 (1989). Reported below: 882 F. 2d 929.

No. 89–5837. LAWS *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433. Reported below: 325 N. C. 81, 381 S. E. 2d 609.

No. 89–6077. QUESINBERRY *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma paupe-*

ris granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina*, *ante*, p. 433. Reported below: 325 N. C. 125, 381 S. E. 2d 681.

No. 89–6526. ARTIS *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina*, *ante*, p. 433. Reported below: 325 N. C. 278, 384 S. E. 2d 470.

Miscellaneous Orders

No. — — ——. BAKER *v.* GONDLES, SHERIFF, ARLINGTON COUNTY JAIL, ET AL.; and

No. — — ——. HICKSON *v.* BOWLES, SHERIFF. Motions to direct the Clerk to file petitions for writs of certiorari out of time denied.

No. A–591. NEVILLE *v.* APPELLATE DIVISION, SUPREME COURT OF NEW YORK, SECOND JUDICIAL DEPARTMENT. C. A. 2d Cir. Application for stay of proceedings, addressed to JUSTICE BRENNAN and referred to the Court, denied.

No. A–603 (89–6461). JACKSON *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla. Application for stay of execution of sentence of death, presented to JUSTICE KENNEDY, and by him referred to the Court, denied.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant the application for stay of execution and the petition for writ of certiorari and would vacate the death sentence in this case.

No. A–620 (89–1303). RESERVE LIFE INSURANCE CO. *v.* EICHENSEER. C. A. 5th Cir. Application for recall and stay of mandate of the United States Court of Appeals for the Fifth Circuit, presented to JUSTICE WHITE, and by him referred to the Court, granted, and it is ordered that the mandate is stayed pending final disposition of the petition for writ of certiorari.

No. D–843. In re Disbarment of Brown. Disbarment entered. [For earlier order herein, see 493 U. S. 988.]

No. D–850. In re Disbarment of Morrison. James Robert Morrison III, of Alton, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on January 16, 1990 [493 U. S. 1040], is hereby discharged.

No. D–853. In re Disbarment of Jones. Motion to defer further proceedings granted. [For earlier order herein, see 493 U. S. 1040.]

No. D–876. In re Disbarment of Tobin. It is ordered that Thomas P. Tobin, of Lloyd Harbor, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–877. In re Disbarment of Solerwitz. It is ordered that Jack B. Solerwitz, of Brookville, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–2109. Kansas et al. *v.* Kansas Power & Light Co. et al. C. A. 10th Cir. [Certiorari granted, 493 U. S. 1041.] Motion of Nancy Allevato, Personal Representative of Michael J. Ferrantino, Sr., deceased, for leave to file a brief as *amicus curiae* granted.

No. 89–453. Metro Broadcasting, Inc. *v.* Federal Communications Commission et al. C. A. D. C. Cir. [Certiorari granted, 493 U. S. 1017.] Motion of respondent Rainbow Broadcasting Co. for divided argument granted.

No. 89–504. Sullivan, Secretary of Health and Human Services *v.* Finkelstein. C. A. 3d Cir. [Certiorari granted, 493 U. S. 1055.] Motion of the Solicitor General to dispense with printing the joint appendix granted.

No. 89–901. W. R. Grace & Co.-Conn. *v.* Department of Revenue of Montana et al., 493 U. S. 1094. Motion of respondent Department of Revenue of Montana for damages and costs denied.

No. 89–5691. HUGHEY *v.* UNITED STATES. C. A. 5th Cir. [Certiorari granted, 493 U. S. 1018.] Motion of Insurance Crime Prevention Institute et al. for leave to file a brief as *amici curiae* granted.

No. 89–5809. SAWYER *v.* SMITH, INTERIM WARDEN. C. A. 5th Cir. [Certiorari granted, 493 U. S. 1042.] Motion of Stephen H. Sachs et al. for leave to file a brief as *amici curiae* granted.

No. 89–5867. IRWIN *v.* DEPARTMENT OF VETERANS AFFAIRS ET AL. C. A. 5th Cir. [Certiorari granted, 493 U. S. 1069.] Motion for appointment of counsel granted, and it is ordered that Jon R. Ker, Esq., of Hewitt, Tex., be appointed to serve as counsel for petitioner in this case.

No. 89–6560. MINTZ *v.* SUPREME COURT OF CALIFORNIA. Sup. Ct. Cal. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 9, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–6455. IN RE WARREN; and

No. 89–6492. IN RE WALKER. Petitions for writs of mandamus denied.

No. 89–927. IN RE WILL, SENIOR JUDGE, UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. C. A. 7th Cir. Motions of Loyola University of Chicago School of Law and Hans Zeisel for leave to file briefs as *amici curiae* granted. Petition for writ of mandamus or prohibition or certiorari denied. Reported below: 881 F. 2d 494.

No. 89–6551. IN RE MARTIN; and

No. 89–6594. IN RE MARTIN. Petitions for writs of mandamus and/or prohibition denied.

Certiorari Granted

No. 89–964. MOSKAL *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. Reported below: 888 F. 2d 283.

No. 89–1166. GROVES ET AL. *v.* RING SCREW WORKS, FERNDALE FASTENER DIVISION. C. A. 6th Cir. Certiorari granted. Reported below: 882 F. 2d 1081.

Certiorari Denied. (See also No. 89–927, *supra.*)

No. 89–811. NEIMAN, DBA CONCOURSE NURSING HOME *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 126.

No. 89–870. KIESEL CO., INC. *v.* HOUSEHOLDER, SPECIAL AGENT, FEDERAL BUREAU OF INVESTIGATION. C. A. 8th Cir. Certiorari denied. Reported below: 879 F. 2d 385.

No. 89–914. NATIONAL POSTERS, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 175.

No. 89–931. PORTLAND AUDUBON SOCIETY ET AL. *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1233.

No. 89–973. LOWE ET AL. *v.* COMMACK UNION FREE SCHOOL DISTRICT ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 886 F. 2d 1364.

No. 89–977. BALLARD *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1078.

No. 89–985. JAY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1081.

No. 89–986. LUCAS *v.* SKINNER, SECRETARY OF TRANSPORTATION. C. A. 4th Cir. Certiorari denied. Reported below: 879 F. 2d 1240.

No. 89–992. CERTIFIED PLAINTIFF CLASS IN MDL–250 *v.* FOLDING CARTON RESERVE FUND ET AL.;

No. 89–1081. FOLDING CARTON ADMINISTRATION COMMITTEE ET AL. *v.* FOLDING CARTON RESERVE FUND ET AL.; and

No. 89-1097. UNITED STATES *v.* FOLDING CARTON RESERVE FUND ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 881 F. 2d 494.

No. 89-1002. WHITE *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 879 F. 2d 1509.

No. 89-1012. FIORELLA ET AL. *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 725.

No. 89-1022. PEPSICO, INC. *v.* SHARP. Sup. Ct. Okla. Certiorari denied. Reported below: 781 P. 2d 814.

No. 89-1030. BROWN *v.* LEDBETTER, COMMISSIONER, GEORGIA DEPARTMENT OF HUMAN RESOURCES, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 1558.

No. 89-1037. XEMAS, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89-1043. HARRIS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 882 F. 2d 1334.

No. 89-1044. OCEAN STATE PHYSICIANS HEALTH PLAN, INC., ET AL. *v.* BLUE CROSS & BLUE SHIELD OF RHODE ISLAND. C. A. 1st Cir. Certiorari denied. Reported below: 883 F. 2d 1101.

No. 89-1049. DANESE, PERSONAL REPRESENTATIVE OF THE ESTATE OF DANESE, ET AL. *v.* ASMAN, CHIEF OF POLICE OF THE CITY OF ROSEVILLE, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 1239.

No. 89-1112. WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY *v.* JOHNSON ET VIR. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 53, 883 F. 2d 125.

No. 89-1114. DONALDSON ET AL. *v.* HOPKINS TOWNSHIP, ILLINOIS, ET AL. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 182 Ill. App. 3d 1107, 554 N. E. 2d 1125.

No. 89-1123. FLEISCHHAUER ET AL. *v.* FELTNER ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 879 F. 2d 1290.

No. 89-1130. RUSSELL *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 8th Cir. Certiorari denied. Reported below: 887 F. 2d 170.

No. 89–1134. YOSEF *v.* PASSAMAQUODDY TRIBE ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 876 F. 2d 283.

No. 89–1136. McDONNELL *v.* BOARD OF COMMISSIONERS, CANYON COUNTY, IDAHO. Sup. Ct. Idaho. Certiorari denied. Reported below: 116 Idaho 824, 780 P. 2d 146.

No. 89–1138. STEELE *v.* MINNESOTA. Ct. App. Minn. Certiorari denied.

No. 89–1139. LOCAL 827, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS *v.* TRAD ET AL. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–1144. SARGENT ET AL. *v.* PAINEWEBBER INC. ET AL. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 7, 882 F. 2d 529.

No. 89–1145. McCRACKEN *v.* CITY OF COLLEGE PARK, GEORGIA, ET AL. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 490, 384 S. E. 2d 648.

No. 89–1150. BLUE CROSS & BLUE SHIELD OF MARYLAND, INC. *v.* WEINER ET AL. Dist. Ct. App. Fla., 4th Dist. Certiorari denied. Reported below: 543 So. 2d 794.

No. 89–1153. FLORIDA *v.* CHRISTIAN; and
No. 89–6462. CHRISTIAN *v.* FLORIDA. Sup. Ct. Fla. Certiorari denied. Reported below: 550 So. 2d 450.

No. 89–1155. THOMAS *v.* CARPENTER ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 828.

No. 89–1169. COMORA ET AL. *v.* RADELL ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1174. HIRSCH, TESTAMENTARY EXECUTOR OF THE SUCCESSION OF GODCHAUX, WIDOW OF NEWMAN, ET AL. *v.* CITY OF NEW ORLEANS ET AL. Sup. Ct. La. Certiorari denied. Reported below: 549 So. 2d 1218.

No. 89–1180. BARRETT ET AL. *v.* CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO. C. A. 1st Cir. Certiorari denied. Reported below: 882 F. 2d 1.

No. 89–1181. BURLINGTON NORTHERN RAILROAD COMPANY EMPLOYEES *v.* MONTANA DEPARTMENT OF REVENUE ET AL.

Sup. Ct. Mont. Certiorari denied. Reported below: 239 Mont. 458, 781 P. 2d 1121.

No. 89–1183. TRUMPOLD ET UX. *v.* BESCH ET AL. App. Ct. Conn. Certiorari denied. Reported below: 19 Conn. App. 22, 561 A. 2d 438.

No. 89–1184. LACKE ET AL. *v.* GRAY, FKA LENGYEL. C. A. 7th Cir. Certiorari denied. Reported below: 885 F. 2d 399.

No. 89–1185. PUERTO RICO AQUEDUCT AND SEWER AUTHORITY ET AL. *v.* COMITE PRO RESCATE DE LA SALUD ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 888 F. 2d 180.

No. 89–1187. BANFF, LTD., FKA SWEATER BEE BY BANFF, LTD. *v.* SALANT CORP., SUCCESSOR IN INTEREST TO BOTH MANHATTAN INDUSTRIES, INC., AND BAYARD SHIRT CORP. C. A. 2d Cir. Certiorari denied. Reported below: 885 F. 2d 1.

No. 89–1188. KELLY *v.* GILL, STATE ATTORNEY, FIFTH JUDICIAL CIRCUIT OF FLORIDA, ET AL. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 544 So. 2d 1162.

No. 89–1190. AMAZING STORES, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 100, 887 F. 2d 328.

No. 89–1196. PACYNA *v.* GREENLEY ET AL. Sup. Ct. N. Y., Erie County. Certiorari denied.

No. 89–1199. STICH *v.* UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA (ROBERTSON ET AL., REAL PARTIES IN INTEREST). C. A. 9th Cir. Certiorari denied.

No. 89–1200. DOHR, PERSONAL REPRESENTATIVE OF THE ESTATE OF DOHR *v.* PROVENCAL ET AL. Ct. App. Mich. Certiorari denied.

No. 89–1202. FOLSTAD ET AL. *v.* ILLINOIS STATE BOARD OF INVESTMENT ET AL. C. A. 7th Cir. Certiorari denied.

No. 89–1204. UNITED STATES DEPARTMENT OF DEFENSE *v.* NATIONAL SECURITY ARCHIVE. C. A. D. C. Cir. Certiorari denied. Reported below: 279 U. S. App. D. C. 308, 880 F. 2d 1381.

No. 89–1205. CALVERT *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 553 So. 2d 136.

No. 89–1207. PMI PETROLEUM MARKETERS, INC., ET AL. *v.* GETTY PETROLEUM CORP. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 1376.

No. 89–1208. LOCAL 530 OF OPERATIVE PLASTERERS & CEMENT MASONS INTERNATIONAL ASSN. *v.* DRYWALL TAPERS & POINTERS OF GREATER NEW YORK, LOCAL 1974. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 389.

No. 89–1210. HARDUVEL ET AL. *v.* GENERAL DYNAMICS CORP. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1311.

No. 89–1211. COGSWELL *v.* COLORADO. Sup. Ct. Colo. Certiorari denied.

No. 89–1213. CINEMA BLUE OF CHARLOTTE, INC., ET AL. *v.* GILCHRIST, DISTRICT ATTORNEY OF THE 26TH PROSECUTORIAL DISTRICT, NORTH CAROLINA. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 49.

No. 89–1214. ORTHOKINETICS, INC., ET AL. *v.* PENOX TECHNOLOGIES, INC., ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 282.

No. 89–1222. AHKTAR, DBA CIRCLE MOBIL *v.* BIRD OIL CO. C. A. 4th Cir. Certiorari denied.

No. 89–1224. YOUNGBERG, DBA MAKI *v.* UNITED STATES. C. A. Fed. Cir. Certiorari denied. Reported below: 889 F. 2d 1099.

No. 89–1227. CSXT, INC. *v.* PITZ, DIRECTOR, DEPARTMENT OF TRANSPORTATION OF MICHIGAN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 468.

No. 89–1229. JASSO *v.* FINNEY. Sup. Ct. Alaska. Certiorari denied. Reported below: 781 P. 2d 973.

No. 89–1231. FAN *v.* MINNESOTA. Ct. App. Minn. Certiorari denied. Reported below: 445 N. W. 2d 243.

No. 89–1235. LANDER ET UX. *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 553 So. 2d 640.

No. 89–1236. BOARD OF COUNTY COMMISSIONERS, LAWRENCE COUNTY, OHIO *v.* L. ROBERT KIMBALL & ASSOCIATES. C. A. 6th Cir. Certiorari denied. Reported below: 860 F. 2d 683.

No. 89–1237. GOGOLIN & STELTER *v.* FIRST CITY BANK, BELLAIRE, N. A. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 100.

No. 89–1239. CHIA *v.* LUJAN, SECRETARY OF THE INTERIOR, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 877 F. 2d 64.

No. 89–1244. SHARP *v.* INDIANA. Sup. Ct. Ind. Certiorari denied. Reported below: 534 N. E. 2d 708.

No. 89–1245. COHEN ET AL. *v.* REED ET AL. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 120 App. Div. 2d 480, 501 N. Y. S. 2d 685.

No. 89–1248. RAMPP *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 882 F. 2d 512.

No. 89–1251. WRENN *v.* SULLIVAN, SECRETARY OF HEALTH AND HUMAN SERVICES. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1387.

No. 89–1260. BAUR *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1391.

No. 89–1266. CHAMBERLIN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 330.

No. 89–1271. JUPIN *v.* STETZER ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–1278. MERKOW *v.* LAWN, ADMINISTRATOR OF THE DRUG ENFORCEMENT ADMINISTRATION. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 282.

No. 89–1292. BYERS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 402.

No. 89–1301. SAFIR *v.* UNITED STATES LINES, INC., ET AL. (two cases). C. A. 2d Cir. Certiorari denied.

No. 89–5448. GROFF *v.* HUMMER ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 879 F. 2d 857.

No. 89–5924. ROBTOY *v.* CALLAHAN, SUPERINTENDENT, MCNEIL ISLAND CORRECTION FACILITY; and

No. 89–5925. NORMAN *v.* DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY. C. A. 9th Cir. Certiorari denied. Reported below: No. 89–5924, 871 F. 2d 1478; No. 89–5925, 871 F. 2d 1483.

No. 89–6006. PILKEY *v.* TENNESSEE. Sup. Ct. Tenn. Certiorari denied. Reported below: 776 S. W. 2d 943.

No. 89–6083. DAVIS *v.* ILLINOIS. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 181 Ill. App. 3d 1114, 553 N. E. 2d 448.

No. 89–6146. BLACKMON *v.* ALABAMA. Ct. Crim. App. Ala. Certiorari denied. Reported below: 550 So. 2d 1085.

No. 89–6165. LUCAS *v.* BUNNELL, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–6176. CURL *v.* CALIFORNIA. Ct. App. Cal., 5th App. Dist. Certiorari denied. Reported below: 210 Cal. App. 3d 1310, 258 Cal. Rptr. 308.

No. 89–6178. GROGG *v.* VIRGINIA. Sup. Ct. Va. Certiorari denied.

No. 89–6189. BLIGE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 888 F. 2d 76.

No. 89–6279. ALVAREZ MORENO *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 874 F. 2d 1402.

No. 89–6285. CHAMBERS *v.* OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 332.

No. 89–6290. XETHAKIS *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89–6293. FERREL *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 864 F. 2d 792.

No. 89–6305. WATSON *v.* OHIO. Ct. App. Ohio, Noble County. Certiorari denied.

No. 89–6316. BUCK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 234.

No. 89–6425. FLANAGAN *v.* UNITED STATES PAROLE COMMISSION ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6447. GRAVES *v.* CAREERCOM CORP. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1380.

No. 89–6451. WASKO *v.* MUNICIPAL COURT OF SAN LUIS OBISPO. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–6452. BURSON *v.* SCOTT, WARDEN. Sup. Ct. Ga. Certiorari denied.

No. 89–6454. TRAMMELL *v.* BERRY, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–6456. SAUNDERS *v.* SULLIVAN ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1382.

No. 89–6457. WRIGHT *v.* HOWSE, PAROLE OFFICER, GEORGIA STATE BOARD OF PARDONS AND PAROLES, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–6464. BURROUGHS *v.* HERTZ RENT-A-CAR. C. A. 6th Cir. Certiorari denied. Reported below: 875 F. 2d 862.

No. 89–6466. EAKINS *v.* LECUREUX ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 74.

No. 89–6469. BENNETT *v.* TWEEDALE ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1315.

No. 89–6470. ELDRIDGE *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–6472. FERACI *v.* SMITH, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1389.

No. 89–6479. SUTTLES, ADMINISTRATRIX OF THE ESTATE OF SUTTLES *v.* CITY OF CHATTANOOGA ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1316.

No. 89–6488. THEOPHILE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied.

No. 89–6491. ESTEVES *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89–6496. PRZYBYCZEWSKI *v.* BUBBA. C. A. 3d Cir. Certiorari denied.

No. 89–6498. BEAS *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89–6501. HANNAH *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 88.

No. 89–6502. FERNOS-LOPEZ *v.* FIGARELLA-LOPEZ. Sup. Ct. P. R. Certiorari denied.

No. 89–6504. SULLIVAN *v.* ALASKA. Ct. App. Alaska. Certiorari denied.

No. 89–6505. WHITAKER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (BAY AREA RAPID TRANSIT, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–6506. WHITAKER *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA (PASCARELLA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–6511. FIELDS *v.* STEINBRENNER ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–6519. MARSH *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1090.

No. 89–6521. MCROY *v.* FOGG, SUPERINTENDENT, COXSACKIE CORRECTIONAL FACILITY, ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 1381.

No. 89–6522. ALLEN *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89–6527. HOBBS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 1313.

No. 89–6528. CARRION-COLLAZO *v.* BEYER, SUPERINTENDENT, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 279.

No. 89–6529. EASLEY *v.* MCANULTY ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89–6533. GILLESPIE *v.* WEST VIRGINIA. Cir. Ct. Pleasants County, W. Va. Certiorari denied.

No. 89–6534. CASE *v.* MONDRAGON, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 887 F. 2d 1388.

No. 89–6537. LEWIS *v.* RUSSE ET AL. C. A. 7th Cir. Certiorari denied.

No. 89–6541. WATTS *v.* CALIFORNIA. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–6542. PHILLIPS, AKA SHABAZZ *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–6543. RIVERA *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 131 Ill. 2d 328, 546 N. E. 2d 533.

No. 89–6544. SCOTT *v.* HEATH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1084.

No. 89–6550. O'HALLORAN *v.* RYAN, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT DALLAS, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 262.

No. 89–6552. HUMMEL *v.* JAGO, SUPERINTENDENT, LONDON CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1316.

No. 89–6553. GAUNCE *v.* BURGENER ET AL. C. A. 9th Cir. Certiorari denied.

No. 89–6555. HUTCHERSON *v.* LOCKHART, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 418.

No. 89–6556. MCCONE *v.* SAGEBRUSH PROPERTIES, INC., ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6557. MINDEK *v.* PENNSYLVANIA. Ct. Common Pleas, Washington County, Pa. Certiorari denied.

No. 89–6558. HARDING *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 567 A. 2d 421.

No. 89–6566. DICE *v.* TRIPPETT, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1315.

No. 89–6567. ALMOND *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6568. COLEMAN *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied.

No. 89-6569. DILLARD *v.* OWENS, COMMISSIONER OF CORRECTIONS OF PENNSYLVANIA, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 260.

No. 89-6570. SUTTON *v.* MARYLAND ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 886 F. 2d 708.

No. 89-6575. BARLEY *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89-6578. SMITHERMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 189.

No. 89-6580. WEATHERSBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6588. MOTTON *v.* MANN'S WRECKER SERVICE. Sup. Ct. Tenn. Certiorari denied.

No. 89-6590. HARRIS *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-6593. LAWRENCE *v.* MOODY, SUPERINTENDENT, WILDWOOD CORRECTIONAL CENTER. C. A. 9th Cir. Certiorari denied.

No. 89-6599. CORN *v.* KNAUF ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1086.

No. 89-6601. POODRY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1410.

No. 89-6602. KIMBERLIN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 886 F. 2d 1318.

No. 89-6610. BARNETT *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1088.

No. 89-6611. DAVIS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1392.

No. 89-6612. GUTIERREZ-GONZALES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 296.

No. 89-6616. SMITH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 892 F. 2d 77.

No. 89-6617. SAEID *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 904.

No. 89-6623. O'NEILL *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION AT HUNTINGDON, ET AL. C. A. 3d Cir. Certiorari denied.

No. 89-6625. MILLINES *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 348.

No. 89-6630. JAMESON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89-6631. WILLIAMS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 212.

No. 89-6632. DYER *v.* EVITTS, WARDEN, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 407.

No. 89-6638. MILLER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 415.

No. 89-6639. KIM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied.

No. 89-6641. BRAGGS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1391.

No. 89-6642. DOOLAN *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 80.

No. 89-6643. FRANKLIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 343.

No. 89-6649. MARTINS *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 88.

No. 89-6652. BROWN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied. Reported below: 567 A. 2d 426.

No. 89-6658. EDWARDS *v.* WALLACE, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 286.

No. 89-6666. SHEEHAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 1461.

No. 89-6668. WILSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89-6670. RODGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1341.

No. 89-6683. FINCH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 891 F. 2d 296.

No. 89-6686. KIRKLAND *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 89-6695. COLEMAN *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-6699. FANT *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 890 F. 2d 408.

No. 89-6710. PETERSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 875 F. 2d 857.

No. 89-6717. MEDLEY *v.* UNITED STATES. Ct. App. D. C. Certiorari denied.

No. 89-6728. HANSON *v.* MCCAUGHTRY, SUPERINTENDENT, WAUPUN CORRECTIONAL INSTITUTION, ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 888 F. 2d 129.

No. 89-6730. HERNANDEZ DE ARAUJO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 343.

No. 88-6881. BEAN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-7133. ADCOX *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-7246. FREY *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 88-7488. WALKER *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 88-7562. KIMBLE *v.* VASQUEZ, WARDEN. Sup. Ct. Cal.;
No. 89-5201. COLEMAN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89-5257. JOHNSON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89-5444. BONIN *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89-5515. HICKS *v.* OHIO. Sup. Ct. Ohio;
No. 89-5621. GRANT *v.* VASQUEZ, WARDEN. Sup. Ct. Cal.;

No. 89–5892. SILVA *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–5898. BURTON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–5997. MCDOWELL *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–5998. HAMILTON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–6181. MCCORMICK *v.* TENNESSEE. Sup. Ct. Tenn.;
No. 89–6194. BLOOM *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–6213. LUCKY *v.* VASQUEZ, WARDEN. Sup. Ct. Cal.;
No. 89–6253. MASSIE *v.* HENNESSEY ET AL. C. A. 9th Cir.;
No. 89–6284. JOHNSON *v.* OHIO. Sup. Ct. Ohio;
No. 89–6322. FOSTER *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89–6342. ROBBINS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–6532. SUMMERLIN *v.* ARIZONA. Super. Ct. Ariz., Maricopa County;
No. 89–6547. LIGHTBOURNE *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.; and
No. 89–6584. ROBERTS *v.* MISSOURI. Sup. Ct. Mo. Certiorari denied. Reported below: No. 88–6881, 46 Cal. 3d 919, 760 P. 2d 996; No. 88–7133, 47 Cal. 3d 207, 763 P. 2d 906; No. 88–7246, 520 Pa. 338, 554 A. 2d 27; No. 88–7488, 47 Cal. 3d 605, 765 P. 2d 70; No. 89–5201, 48 Cal. 3d 112, 768 P. 2d 32; No. 89–5257, 47 Cal. 3d 1194, 767 P. 2d 1047; No. 89–5515, 43 Ohio St. 3d 72, 538 N. E. 2d 1030; No. 89–5898, 48 Cal. 3d 843, 771 P. 2d 1270; No. 89–5998, 48 Cal. 3d 1142, 774 P. 2d 730; No. 89–6181, 778 S. W. 2d 48; No. 89–6194, 48 Cal. 3d 1194, 774 P. 2d 698; No. 89–6253, 875 F. 2d 1386; No. 89–6284, 46 Ohio St. 3d 96, 545 N. E. 2d 636; No. 89–6322, 779 S. W. 2d 845; No. 89–6547, 549 So. 2d 1364; No. 89–6584, 775 S. W. 2d 92.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 88–7381. BONIN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: 47 Cal. 3d 808, 765 P. 2d 460.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death penalty in this case. Even if I did not take this view, I would grant the petition because it raises several important and recurring questions concerning a criminal defendant's Sixth Amendment right to the assistance of counsel unburdened by any conflict of interest. First, on what showing must a trial court explore a possible conflict on the part of a defendant's attorney? Second, if a defendant's attorney had an actual conflict, must the defendant demonstrate that the conflict adversely affected the attorney's performance in order to obtain a new trial?

I

On the eve of his trial for several murders and robberies, petitioner William George Bonin moved to replace Earl Hanson, who had been his attorney for over a year, with William Charvet. The prosecution opposed the motion principally on the ground that substituting Charvet would create two conflicts of interest that could jeopardize the effectiveness of Charvet's representation. First, Charvet had maintained an attorney-client relationship with James Munro, Bonin's alleged accomplice and a key prosecution witness against him, during which Charvet and Munro had discussed the facts of the case. Second, the prosecution maintained that Charvet's retainer agreement likely included a provision giving him the literary rights to Bonin's life story. The trial court initially denied Bonin's motion to substitute Charvet for Hanson, in large part because it found that Charvet's relationship with Munro created an actual conflict of interest. The court later permitted Charvet to represent Bonin, however, without addressing either conflict and without obtaining a waiver from Bonin of his right to conflict-free counsel.

Bonin subsequently was convicted of 10 counts of murder and robbery and sentenced to death. The California Supreme Court, in a split decision, affirmed the convictions and sentence, rejecting Bonin's argument that Charvet's alleged and actual conflicts of interest deprived Bonin of effective assistance of counsel. The court held that the trial court did not err by failing to explore the alleged literary rights agreement because the trial court had not been presented with sufficient evidence of such an agreement. Although the State Supreme Court did find that the trial court erred in allowing Charvet's substitution after learning of his relationship with Munro, it refused to reverse the convictions and sentence on the ground that Bonin had not demonstrated that Charvet's performance as counsel was adversely affected by this conflict of interest. 47 Cal. 3d 808, 765 P. 2d 460 (1989).

II

I would grant Bonin's petition to determine whether the trial court had a duty to inquire into the potential conflict of interest arising from the alleged literary rights deal between Charvet and Bonin. It is well established that the right to effective assistance of counsel carries with it "a correlative right to representation that is free from conflicts of interest." *Wood* v. *Georgia*, 450 U. S. 261, 271 (1981). It is also apparent that a literary rights agreement may seriously undermine an advocate's loyalty to his client's interests. In a passage quoted in the California Supreme Court's opinion, the American Bar Association underscores the dangers of such arrangements:

> "A grave conflict of interest can arise out of an agreement between a lawyer and an accused giving the lawyer the right to publish books, plays, articles, interviews, pictures, or related literary rights concerning the case. . . . [I]t may place the lawyer under temptation to conduct the defense with an eye on the literary aspects and its dramatic potential. If such an arrangement or contract is part of the fee, in lieu of the fee, or a condition of accepting the employment, it is especially reprehensible." ABA Standards for Criminal Justice 4–3.4 (2d ed. 1980).

See also 47 Cal. 3d, at 836, 765 P. 2d, at 475 (quoting prior draft of ABA standards).

To protect a defendant's right to conflict-free counsel, a trial court must initiate an inquiry when it knows or reasonably should know of the possibility of a conflict of interest. *Wood* v. *Georgia*, *supra*, at 272, and n. 18; see also *Wheat* v. *United States*, 486 U. S. 153, 160 (1988); *Cuyler* v. *Sullivan*, 446 U. S. 335, 347 (1980). In *Wood*, the petitioners had been convicted of distributing obscene materials. Their probation was revoked when they failed to pay substantial fines. This Court vacated the probation revocation because the trial court had failed to inquire into a possible conflict of interest on the part of the petitioners' attorney. The possibility of a conflict was apparent not from any concrete evidence, but from the circumstances of the representation. In particular, the petitioners' lawyer, who had been selected and paid by their employer, pressed a constitutional attack rather than arguing for leniency and a reduction in the fines, possibly to create a test case for the petitioners' employer. *Wood* v. *Georgia*, 450 U. S., at 272. Moreover, this Court found that the "the fact that the State raised the conflict problem explicitly and requested that the court look into it" should have alerted the trial court to the need for further inquiry. *Id.*, at 273. The Court held that although it was difficult to determine from the appellate record whether an *actual* conflict was present, "the *possibility* of a conflict of interest was sufficiently apparent at the time of the revocation hearing to impose upon the court a duty to inquire further." *Id.*, at 272.

The California Supreme Court departed from *Wood* in this case by holding that a defendant must present hard evidence to trigger a trial court's duty to investigate a potential conflict of interest. The possibility of a conflict here was at least as apparent as it was in *Wood*. Bonin, though indigent, was able to hire a private attorney on the eve of the trial in a highly publicized and notorious case. The prosecution specifically objected to the substitution of Charvet because of the likelihood that the retainer agreement included a literary rights deal. When the court asked Charvet whether he had made such a deal with Bonin, he answered evasively, asserting that the prosecution had no right to inquire into his fee arrangement and that this Court would sanction any literary rights agreement. Despite the clear possibility that Charvet had entered into a retainer agreement that could seriously compromise his duty of loyalty to his client, the court failed to inquire further, even after continued objection by the prosecution.

Because the trial court did not conduct the necessary inquiry, it is impossible for this Court to determine from the record whether an actual conflict resulted from a literary rights deal. As in *Wood*, *supra*, at 273, the only appropriate response in such a circumstance is to vacate the judgment below and remand to the trial court for it to determine whether an actual conflict existed. If the trial court were to find an actual conflict, I believe, for the reasons next set out, that Bonin is entitled to a new trial.

III

I would also grant Bonin's petition to decide whether a criminal defendant denied the right to conflict-free counsel must show that the conflict adversely affected his attorney's performance. The California Supreme Court acknowledged Charvet's prior attorney-client relationship with Munro; it further held that the trial court erred by permitting Charvet to represent Bonin without obtaining a waiver from Bonin of his right to conflict-free counsel.* Nevertheless, the court refused to reverse Bonin's conviction because petitioner had not shown that the conflict adversely affected Charvet's performance. In my view, we should presume adverse effect on counsel's performance once an actual conflict is shown.

This Court has never squarely resolved the question whether proof of adverse effect is required to overturn a conviction once an actual conflict is proved. In *Cuyler* v. *Sullivan*, the Court stated that where a trial court has no reason to suspect a possible conflict, a defendant, in order to establish a Sixth Amendment violation on appeal, must show that "an actual conflict of interest adversely affected his lawyer's performance." 446 U. S., at 348. *Sullivan* left unclear, however, whether an actual conflict should be presumed to have an adverse effect, or whether a defendant must prove *both* an actual conflict *and* an adverse effect. See *id.*, at 358 (MARSHALL, J., concurring in part and dissenting in part). *Sullivan* held merely that "the *possibility* of conflict is insufficient to impugn a criminal conviction" on appeal. *Id.*, at 350 (emphasis added). This Court subsequently appeared to suggest in dictum that *Sullivan* required separate showings of actual conflict and adverse effect to reverse a criminal conviction. *Strickland* v. *Washington*, 466 U. S. 668, 692 (1984) ("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance'") (quoting *Cuyler* v. *Sullivan*, *supra*, at 350, 348). *Strickland*'s reading of *Sullivan*, however, is at odds with the holding in *Wood* v. *Georgia*. In *Wood*, this Court not only vacated the judgment below because

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*Of course, if Bonin had knowingly, intelligently, and voluntarily waived his right to conflict-free counsel, he would have no grounds for appeal on this score. Cf. *Wheat* v. *United States*, 486 U. S. 153, 166–167, and n. 1 (1988) (MARSHALL, J., dissenting). Absent such a waiver, however, the trial court had a duty to inquire into possible conflicts and, upon finding an actual conflict, to deny the motion to substitute Charvet.

the trial court had failed to investigate a possible conflict, but it also instructed the trial court to conduct a new revocation hearing if it found that an actual conflict existed and that the petitioners had not waived their right to conflict-free counsel. *Wood* v. *Georgia*, 450 U. S., at 273–274. The Court did not require the petitioners to prove on remand that the conflict adversely affected their counsel's performance.

It is axiomatic that "the assistance of counsel is among those 'constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.'" *Holloway* v. *Arkansas*, 435 U. S. 475, 489 (1978) (quoting *Chapman* v. *California*, 386 U. S. 18, 23 (1967)). The right to counsel's undivided loyalty is a critical component of the right to assistance of counsel; when counsel is burdened by a conflict of interest, he deprives his client of his Sixth Amendment right as surely as if he failed to appear at trial. See *Holloway* v. *Arkansas*, *supra*, at 490 ("The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters"). For this reason, a defendant who shows an actual conflict need not demonstrate that his counsel's divided loyalties prejudiced the outcome of his trial. *Cuyler* v. *Sullivan*, *supra*, at 349–350. The right to conflict-free counsel is simply too important and absolute "to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Glasser* v. *United States*, 315 U. S. 60, 76 (1942); accord, *Cuyler* v. *Sullivan*, *supra*, at 349. We should be no more willing to countenance nice calculations as to how a conflict adversely affected counsel's performance. "The conflict itself demonstrate[s] a denial of the 'right to have the effective assistance of counsel.'" *Cuyler* v. *Sullivan*, *supra*, at 349 (quoting *Glasser* v. *United States*, *supra*, at 76).

Moreover, requiring proof of actual adverse effect would essentially eliminate all Sixth Amendment claims based on conflicts of interest because gauging how a conflict affected an attorney's performance is usually impossible. As this Court explained in the context of prejudice:

> "[I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process. It may be possible in some cases to indentify from

> the record the prejudice resulting from an attorney's failure to undertake certain trial tasks, but even with a record of the sentencing hearing available it would be difficult to judge intelligently the impact of a conflict on the attorney's representation of a client. And to assess the impact of a conflict of interests on the attorney's options, tactics, and decisions in plea negotiations would be virtually impossible." *Holloway* v. *Arkansas*, *supra*, at 490–491.

The same factors that make it nearly impossible to show prejudice make it equally difficult to prove adverse effect. In this case, for example, how could petitioner demonstrate on appeal that Charvet's attorney-client relationship with Munro limited Charvet's ability to cross-examine Munro? The California Supreme Court was satisfied that Charvet's attack on Munro's credibility during cross-examination was "broad and deep." But an appellate court cannot determine what Charvet was *unable* to ask for fear of violating Munro's attorney-client privilege. Given the finding that Charvet's relationship with Munro created a conflict, it seems beyond doubt that Charvet must have refrained from pursuing certain lines of inquiry. Similarly, if the trial court on remand were to find that an actual conflict resulted from the literary rights agreement, it would be exceedingly difficult for that court, or an appellate court, to determine whether counsel's actions or inactions resulted from strategic choices made in the interest of his client or, rather, from counsel's own interest in maximizing the trial's drama so as to create a bestseller.

Conflict-of-interest claims thus differ in kind from standard ineffective-assistance-of-counsel claims. This Court has, with respect to the latter, indulged in the presumption that counsel's conduct was the result of strategic decisions made in accordance with the client's best interests. *Strickland* v. *Washington*, 466 U. S., at 689. Such a presumption is arguably tenable in those cases because counsel's basic loyalty to his client is not in question. When a known conflict undermines counsel's duty of loyalty, "perhaps the most basic of counsel's duties," *id.*, at 692, however, that presumption is inapplicable; instead, a court must presume that counsel's divided loyalties adversely affected his performance on behalf of his client. When the effects of a constitutional violation are not only unknown but unknowable, the Constitution demands that doubts be resolved in favor of a criminal defendant. Unless the defendant validly waived his right to conflict-free counsel, then, a showing of actual conflict alone necessitates a new trial.

IV

Because Bonin stands to be executed, it is imperative that this Court ensure that he was fairly tried and sentenced. The Sixth Amendment demands that every criminal defendant receive the assistance of conflict-free counsel. It is undisputed that petitioner's counsel was burdened by at least one actual conflict and possibly another. It is also a fact that petitioner did not waive his right to conflict-free counsel. In these circumstances, the Sixth Amendment requires that petitioner be given a new trial. I therefore dissent from the denial of certiorari.

No. 89–773. TENNESSEE *v.* PILKEY. Sup. Ct. Tenn. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 776 S. W. 2d 943.

No. 89–1182. KENTUCKY *v.* JOHNSON. Sup. Ct. Ky. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 777 S. W. 2d 876.

No. 89–882. CLARKE COUNTY, GEORGIA, SCHOOL DISTRICT *v.* DREW P. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 877 F. 2d 927.

No. 89–1189. BROCK ET UX., INDIVIDUALLY AND AS NEXT FRIENDS OF BROCK, A MINOR *v.* MERRELL DOW PHARMACEUTICALS, INC. C. A. 5th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 874 F. 2d 307 and 884 F. 2d 166.

No. 89–1016. HERNANDEZ COLON, GOVERNOR OF PUERTO RICO, ET AL. *v.* MORALES FELICIANO ET AL. C. A. 1st Cir. Motion of respondents Pedro Rivera Ortiz et al. for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 887 F. 2d 1.

No. 89–1318. EGLY ET AL. *v.* MINNESOTA MINING & MANUFACTURING CO. C. A. Fed. Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 891 F. 2d 299.

No. 89–5629. WALLACE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. JUSTICE O'CONNOR took no part in the consideration or decision of this petition. Reported below: 160 Ariz. 424, 773 P. 2d 983.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentence in this case.

No. 89–6347. SMITH *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. JUSTICE BLACKMUN dissents and would grant certiorari. Reported below: 840 F. 2d 787.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

In *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982), we held that imposing a death sentence on a defendant "who does not himself kill, attempt to kill, or intend that a killing take place" violates the Eighth and Fourteenth Amendments' prohibitions against cruel and unusual punishment. In *Cabana* v. *Bullock*, 474 U. S. 376, 390–391 (1986), the Court reaffirmed and expanded upon *Enmund*, holding that the federal courts could not make the determination that a defendant met one of the *Enmund* criteria on their review of state-court judgments. Rather, we held that "the State's judicial process leading to the imposition of the death penalty must at *some* point provide for a finding of that factual predicate." 474 U. S., at 390–391. In *Tison* v. *Arizona*, 481 U. S. 137, 158 (1987), this Court held that a showing of both reckless indifference to human life and major participation in a felony would be sufficient to satisfy *Enmund.* The Court refused to make those findings itself, however, instead remanding to the state courts for a determination whether those factors were present. 481 U. S., at 158.

In this case, the Court of Appeals for the Eleventh Circuit found that *Enmund*, *Cabana*, and *Tison* were satisfied solely on the basis of the Florida Supreme Court's determination that there was sufficient evidence from which the jury *could* have found that defendant had the intent to kill. In refusing to review the decision below, this Court sanctions a grave departure from our precedents by a panel of a court with a major role in the administration of this Nation's death penalty law. Accordingly, I dissent.

Respondent does not dispute the basic rule that a State may not sentence to death a defendant "who does not himself kill, attempt to kill, or intend that a killing take place," *Enmund*, *supra*, at 797, unless that defendant was a major participant in a felony and exhibited reckless indifference to human life, *Tison*, *supra*, at 158. Nor does respondent suggest that a federal court may make the required finding. Instead, the issue in this case is whether a state court's conclusion that "there was sufficient evidence from which the jury could have found [Smith] guilty of premeditated murder," *Smith* v. *State*, 424 So. 2d 726, 733 (1983), constitutes the culpability finding required by our cases.

The entirety of the Eleventh Circuit's reasoning on this point is that "[i]mplicit in [the Florida Supreme Court's sufficiency] finding is the conclusion that Smith had the intent to kill." 840 F. 2d 787, 793 (1988). Simply asserting a conclusion is hardly sufficient to justify it, especially where, as here, the conclusion is so plainly farfetched. The Florida court's finding that the evidence was sufficient for Smith's jury to find him guilty of premeditated murder is nothing more than a finding that reasonable people *could* have found that verdict justified; it is emphatically not a finding that this jury *did* determine that Smith's acts were premeditated. Indeed, the *Cabana* Court rejected as insufficient a state court's statement far more conclusive than the one here. There, the Mississippi Supreme Court found that "'[t]he evidence [was] overwhelming that [defendant] was an active participant in the assault and homicide.'" *Cabana*, 474 U. S., at 389. Although this finding was "sufficient to make [the defendant] liable for the murder and deserving of the death penalty in light of Mississippi law," it did not satisfy the Eighth Amendment. *Ibid.*

That the Florida court did not make the required finding is particularly apparent from an examination of its opinion as a whole. In response to an unrelated guilt-phase point of error, the court found that Smith could have been found guilty and sentenced to death on either of two theories, one of which was the felony-murder doctrine. 424 So. 2d, at 731. "Under this theory the jury would not have needed to conclude that [Smith] had the requisite intent." *Id.*, at 731–732. The Florida Supreme Court's sufficiency determination thus in no way establishes that Smith's jury found the essential factual predicate to a death verdict under *Enmund*, especially in light of the court's acknowledgement that the jury was instructed that it could convict Smith regardless of his intent.*

It is tempting to view the Eleventh Circuit's ruling in this case as an unfortunate aberration that should be disregarded as such. Perhaps such a hope has informed this Court's decision to deny certiorari. Nonetheless, the refusal to review the decision below has important consequences. A panel of a Court of Appeals with jurisdiction over the death penalty statutes of three States has equated a state appellate court's finding that there was sufficient evidence from which a jury could have found intent to kill with a finding that the defendant did in fact intend to kill. The panel came to that conclusion notwithstanding that the jury was instructed that it could return a sentence of death even if it did *not* believe that Smith had the requisite intent. Sufficiency of the evidence claims are routinely made in state death penalty appeals, and state appellate courts invariably will have to make a sufficiency finding in the course of their review. To permit such a finding to satisfy *Enmund*, *Cabana*, and *Tison* is to eviscerate their protections. Because I do not think it seemly or sensible for this Court to permit a significant violation of the Eighth Amendment to stand, simply on the hope that it will have no effect beyond the immediate case, I dissent.

Even if I did not believe that this case otherwise merited review, I would adhere to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting). I would therefore grant the petition for certiorari and vacate the death sentence in this case.

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*Of course, after *Tison* v. *Arizona*, 481 U. S. 137 (1987), the Florida courts were not required to find that Smith intended to kill in order to satisfy the Eighth Amendment. A finding that he was recklessly indifferent to human life and a major participant in the felony would have satisfied *Tison*. *Id.*, at 158. The Florida courts did not even *purport* to make the finding required by *Tison*, however. The only finding in the Florida courts on which respondent relies is the finding that there was sufficient evidence from which the jury could have found Smith guilty of premeditated murder.

Rehearing Denied

No. 88–5050. HOLLAND *v.* ILLINOIS, 493 U. S. 474;

No. 88–6995. MOORE *v.* CALIFORNIA, 490 U. S. 1095;

No. 89–820. KINDIG *v.* PAN AMERICAN WORLD AIRWAYS, INC., ET AL., 493 U. S. 1025;

No. 89–897. GRIMES *v.* LOUISVILLE & NASHVILLE RAILROAD CO., 493 U. S. 1058;

No. 89–5452. WEAVER *v.* SHEAFFER ET AL., 493 U. S. 1059; and

No. 89–5784. BOWYER *v.* UNITED STATES AIR FORCE ET AL., 493 U. S. 1046. Petitions for rehearing denied.

No. 88–2137. MCMONAGLE ET AL. *v.* NORTHEAST WOMEN'S CENTER, INC., 493 U. S. 901. Motion for leave to file petition for rehearing denied.

MARCH 22, 1990

Dismissal Under Rule 46

No. 88–2109. KANSAS ET AL. *v.* KANSAS POWER & LIGHT CO. ET AL. C. A. 10th Cir. [Certiorari granted, 493 U. S. 1041.] Writ of certiorari dismissed as to respondent Kansas Power & Light Co. under this Court's Rule 46.

MARCH 26, 1990

Certiorari Granted—Vacated and Remanded

No. 88–1878. SAFFLE, WARDEN, ET AL. *v.* DAVIS. C. A. 10th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Saffle* v. *Parks*, *ante*, p. 484. JUSTICE BLACKMUN and JUSTICE STEVENS dissent. Reported below: 869 F. 2d 1401.

No. 88–7081. MCNEIL *v.* NORTH CAROLINA. Sup. Ct. N. C. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina*, *ante*, p. 433. Reported below: 324 N. C. 33, 375 S. E. 2d 909.

JUSTICE KENNEDY, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE SCALIA join, dissenting.

The Court adopts what may be perceived as a prudent course by granting certiorari in this case, vacating the decision of the

North Carolina Supreme Court, and remanding for consideration in light of our decision in *McKoy* v. *North Carolina*, *ante*, p. 433. It is true that petitioner was sentenced prior to our decision in *McKoy*, and that the North Carolina Supreme Court rejected his challenge to the sentence on the basis of its decision in *State* v. *McKoy*, 323 N. C. 1, 372 S. E. 2d 12 (1988). In the particular circumstances of this case, however, there is no basis upon which we should disturb the judgment.

The record shows that the unanimity instruction held unconstitutional in *McKoy* was *not* given in petitioner's trial. Neither did the verdict form given to the jurors contain any unanimity requirement as to mitigating circumstances. The form, reproduced as Appendix E to the petition for certiorari, required unanimity as to the presence of aggravating factors (issue 1) and as to the result of the weighing stages of the statute (issues 3 and 4), but not as to presence of mitigating factors (issue 2). Given the express unanimity requirement as to issues 1, 3, and 4, but the omission of any such requirement as to issue 2 on the verdict form, no reasonable juror would have interpreted the form or the instructions to require unanimity as to mitigating factors.

On remand, the North Carolina Supreme Court remains free to consider these facts, or any others that may affect the determination whether our opinion in *McKoy* requires alteration of its judgment. Similarly, in cases where there is a question of procedural default, *e. g.*, *Artis* v. *North Carolina*, *ante*, p. 1023, or where a unanimity requirement may have been harmless due to failure to present mitigating evidence, *e. g.*, *Hunt* v. *North Carolina*, *ante*, p. 1022; *Laws* v. *North Carolina*, *ante*, p. 1022, these issues remain open for examination on remand. Because it is in my view clear, however, that no unanimity requirement was involved in this case, I would deny the petition for certiorari.

No. 89–1128. UNITED TRANSPORTATION UNION *v.* UNITED TRANSPORTATION UNION, LOCAL 74. C. A. 6th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Teamsters* v. *Terry*, *ante*, p. 558. Reported below: 881 F. 2d 282.

Miscellaneous Orders

No. — — ——. BROOKS *v.* SECRETARY OF HEALTH AND HUMAN SERVICES. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–632 (89–7005). HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Application for stay of execution of sentence of death, presented to JUSTICE WHITE, and by him referred to the Court, granted pending disposition by this Court of the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending the issuance of the mandate of this Court.

No. A–651. WALKER *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Application for stay, addressed to JUSTICE WHITE and referred to the Court, denied.

No. A–661 (89–939). HEALTHAMERICA ET AL. *v.* MENTON, 493 U. S. 1093. Application for stay pending disposition of a petition for rehearing, addressed to JUSTICE O'CONNOR and referred to the Court, denied.

No. D–815. IN RE DISBARMENT OF SHIMEK. Disbarment entered. [For earlier order herein, see 493 U. S. 949.]

No. D–821. IN RE DISBARMENT OF ELLIOTT. Disbarment entered. [For earlier order herein, see 493 U. S. 950.]

No. D–844. IN RE DISBARMENT OF RAY. Disbarment entered. [For earlier order herein, see 493 U. S. 988.]

No. D–849. IN RE DISBARMENT OF REINER. Disbarment entered. [For earlier order herein, see 493 U. S. 1040.]

No. D–878. IN RE DISBARMENT OF SCHWARTZ. It is ordered that Jeffrey Mark Schwartz, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–879. IN RE DISBARMENT OF ANDERSON. It is ordered that Ronald Etheridge Anderson, of Huntington Park, Cal., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–880. IN RE DISBARMENT OF JACKSON. It is ordered that Hesper A. Jackson, Jr., of Brooklyn, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–881. In re Disbarment of Shoemaker. It is ordered that Daniel W. Shoemaker, of Taneytown, Md., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–882. In re Disbarment of Tierney. It is ordered that Thomas W. Tierney, of Kansas City, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–883. In re Disbarment of Singer. It is ordered that Barry H. Singer, of New York, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–884. In re Disbarment of Sanna. It is ordered that Richard J. Sanna, of Bethpage, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–885. In re Disbarment of Sanders. It is ordered that Sheldon Joel Sanders, of Lido Beach, N. Y., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–2041. Sisson *v.* Ruby et al. C. A. 7th Cir. [Certiorari granted, 493 U. S. 1055.] Motions of American Auto, Inc., and Maritime Law Association of the United States for leave to file briefs as *amici curiae* granted.

No. 88–2109. Kansas et al. *v.* UtiliCorp United Inc. C. A. 10th Cir. [Certiorari granted *sub nom. Kansas* v. *Kansas Power & Light Co.*, 493 U. S. 1041.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–152. English *v.* General Electric Co. C. A. 4th Cir. [Certiorari granted, 493 U. S. 1055.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–260. IDAHO *v.* WRIGHT. Sup. Ct. Idaho. [Certiorari granted, 493 U. S. 1041.] Motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument granted.

No. 89–579. CHARTER CO. *v.* CERTIFIED CLASS IN THE CHARTER SECURITIES LITIGATION ET AL. C. A. 11th Cir. Motion of the parties to defer further consideration of the petition for writ of certiorari granted until May 30, 1990.

No. 89–1040. CHAPPELL *v.* UNITED STATES. C. A. 7th Cir. Motion of petitioner to dispense with printing the reply brief granted.

No. 89–1106. TRINOVA CORP. *v.* MICHIGAN DEPARTMENT OF TREASURY. Sup. Ct. Mich. [Certiorari granted, *ante*, p. 1015.] Motion of petitioner to dispense with printing the joint appendix granted.

No. 89–5011. POWERS *v.* OHIO. Ct. App. Ohio, Franklin County. [Certiorari granted, 493 U. S. 1068.] Motion for appointment of counsel granted, and it is ordered that Robert L. Lane, Esq., of Columbus, Ohio, be appointed to serve as counsel for petitioner in this case.

No. 89–6622. KLIEWER *v.* NEW JERSEY. Super. Ct. N. J., App. Div. Motion of petitioner for leave to proceed *in forma pauperis* denied. Petitioner is allowed until April 16, 1990, within which to pay the docketing fee required by Rule 38(a) and to submit a petition in compliance with Rule 33 of the Rules of this Court.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

For the reasons expressed in *Brown* v. *Herald Co.*, 464 U. S. 928 (1983), we would deny the petition for writ of certiorari without reaching the merits of the motion to proceed *in forma pauperis*.

No. 89–6573. IN RE GILREATH; and

No. 89–6705. IN RE ROSS. Petitions for writs of mandamus denied.

Certiorari Granted

No. 89–1080. BOARD OF EDUCATION OF OKLAHOMA CITY PUBLIC SCHOOLS, INDEPENDENT SCHOOL DISTRICT NO. 89, OKLAHOMA COUNTY, OKLAHOMA *v.* DOWELL ET AL. C. A. 10th Cir. Certiorari granted. Reported below: 890 F. 2d 1483.

No. 89–1215. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW, ET AL. *v.* JOHNSON CONTROLS, INC. C. A. 7th Cir. Certiorari granted. Reported below: 886 F. 2d 871.

No. 89–1283. ARCADIA, OHIO, ET AL. *v.* OHIO POWER CO. ET AL. C. A. D. C. Cir. Certiorari granted. Reported below: 279 U. S. App. D. C. 327, 880 F. 2d 1400.

No. 89–839. ARIZONA *v.* FULMINANTE. Sup. Ct. Ariz. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 161 Ariz. 237, 778 P. 2d 602.

No. 89–1027. NORFOLK & WESTERN RAILWAY CO. ET AL. *v.* AMERICAN TRAIN DISPATCHERS' ASSN. ET AL.; and

No. 89–1028. CSX TRANSPORTATION, INC. *v.* BROTHERHOOD OF RAILWAY CARMEN ET AL. C. A. D. C. Cir. Certiorari granted, cases consolidated, and a total of one hour allotted for oral argument. Reported below: 279 U. S. App. D. C. 239, 880 F. 2d 562.

No. 89–5900. RUST *v.* GUNTER ET AL. C. A. 8th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted. Reported below: 889 F. 2d 1093.

Certiorari Denied

No. 89–593. LIBERTY MUTUAL INSURANCE CO. ET AL. *v.* COMMISSIONER OF REVENUE OF MASSACHUSETTS. Sup. Jud. Ct. Mass. Certiorari denied. Reported below: 405 Mass. 352, 541 N. E. 2d 566.

No. 89–686. NEVINS ET AL. *v.* HOOPA VALLEY TRIBE ET AL.; and

No. 89–890. HOOPA VALLEY TRIBE ET AL. *v.* NEVINS ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 657.

No. 89–847. Studio Art Theatre of Evansville, Inc. *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 530 N. E. 2d 750.

No. 89–865. Trickey *v.* Coffman. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 2d 1057.

No. 89–877. Watkins *v.* Foltz, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 880 F. 2d 415.

No. 89–893. Maryland Pest Control Assn. et al. *v.* Montgomery County, Maryland, et al. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 160.

No. 89–902. W. R. Grace & Co.–Conn. et al. *v.* Federal Deposit Insurance Corporation. C. A. 7th Cir. Certiorari denied. Reported below: 877 F. 2d 614.

No. 89–930. Washington Metropolitan Area Transit Authority *v.* General Railway Signal Co. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 287, 875 F. 2d 320.

No. 89–1056. Department of Health Services of California et al. *v.* Citizens Action League et al. C. A. 9th Cir. Certiorari denied. Reported below: 887 F. 2d 1003.

No. 89–1074. Fairchild Industries, Inc. *v.* Miller et al. C. A. 9th Cir. Certiorari denied. Reported below: 885 F. 2d 498.

No. 89–1124. American Booksellers Assn., Inc., et al. *v.* Virginia. C. A. 4th Cir. Certiorari denied. Reported below: 882 F. 2d 125.

No. 89–1219. Gilbert *v.* Colvert. Ct. App. Okla. Certiorari denied.

No. 89–1225. LAK, Inc. *v.* Deer Creek Enterprises. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 2d 1293.

No. 89–1226. Walker *v.* Suburban Hospital Assn. et al. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 867.

No. 89–1241. Robinson et al. *v.* Dinner Bell Meats et al. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1316.

No. 89–1243. Galloway et al. *v.* Zuckert et al. Ct. App. Iowa. Certiorari denied. Reported below: 447 N. W. 2d 553.

No. 89–1246. Agan *v.* Georgia. Sup. Ct. Ga. Certiorari denied. Reported below: 259 Ga. 541, 384 S. E. 2d 863.

No. 89–1249. Vitale et ux. *v.* City of New Haven et al. C. A. 2d Cir. Certiorari denied. Reported below: 884 F. 2d 1381.

No. 89–1256. Wrenn *v.* McFadden et al. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1082.

No. 89–1257. McMartin et al. *v.* Children's Institute International et al. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 1393, 261 Cal. Rptr. 437.

No. 89–1259. Huyssen *v.* First Union Home Equity Corp. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1390.

No. 89–1282. Barker *v.* City of Philadelphia et al. Pa. Commw. Ct. Certiorari denied. Reported below: 127 Pa. Commw. 666, 560 A. 2d 942.

No. 89–1304. Wickersham *v.* Indiana. Ct. App. Ind. Certiorari denied. Reported below: 523 N. E. 2d 775.

No. 89–1338. Walter *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 1394.

No. 89–1347. Bessay *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 889 F. 2d 352.

No. 89–1353. R. W. Meyer, Inc. *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1497.

No. 89–1365. Damiani *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 890 F. 2d 416.

No. 89–6043. Williams *v.* McCarthy et al. C. A. 9th Cir. Certiorari denied. Reported below: 879 F. 2d 866.

No. 89-6108. DONLEY *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 878 F. 2d 735.

No. 89-6110. DALE *v.* HAEBERLIN, ACTING WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 878 F. 2d 930.

No. 89-6230. PARKER *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89-6296. FULMINANTE *v.* ARIZONA. Sup. Ct. Ariz. Certiorari denied. Reported below: 161 Ariz. 237, 778 P. 2d 602.

No. 89-6300. CAMPBELL *v.* HORTON, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1385.

No. 89-6312. GAINER *v.* JEFFES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1379.

No. 89-6359. WASHINGTON *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 886 F. 2d 154.

No. 89-6364. JACKSON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 581.

No. 89-6433. WEEKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 881 F. 2d 1085.

No. 89-6572. PROWS *v.* KINDT ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6574. ERVIN *v.* CALIFORNIA. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89-6576. CROCKETT *v.* BAPTIST MEDICAL CENTER. C. A. 8th Cir. Certiorari denied. Reported below: 889 F. 2d 1091.

No. 89-6579. SCHMIDT *v.* IOWA. Dist. Ct. Poweshiek County, Iowa. Certiorari denied.

No. 89-6583. SMITH ET UX. *v.* SOONER FEDERAL SAVINGS & LOAN ASSN. C. A. 10th Cir. Certiorari denied.

No. 89-6595. BAKER *v.* OHIO. Sup. Ct. Ohio. Certiorari denied. Reported below: 48 Ohio St. 3d 701, 549 N. E. 2d 525.

No. 89-6597. TURPIN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 780 S. W. 2d 619.

No. 89-6607. TYLER *v.* WYRICK, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1340.

No. 89–6614. ASH *v.* SWEST, INC., ET AL. (two cases). Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–6615. ANDERSON *v.* WORDEN, DISTRICT COURT JUDGE. Sup. Ct. Kan. Certiorari denied.

No. 89–6619. FRIEND *v.* WILSON ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1086.

No. 89–6620. MCCLURE *v.* MAZURKIEWICZ, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTE AT ROCKVIEW. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 281.

No. 89–6621. HUNTER *v.* FLORIDA. Dist. Ct. App. Fla., 5th Dist. Certiorari denied. Reported below: 550 So. 2d 480.

No. 89–6627. TURNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1333.

No. 89–6628. SUTHERLAND ET AL. *v.* FIRST NATIONAL BANK OF COMMERCE. Ct. App. La., 5th Cir. Certiorari denied. Reported below: 545 So. 2d 692.

No. 89–6629. MAGOON *v.* YOUNG, COMMISSIONER OF SOCIAL AND REHABILITATION SERVICES OF VERMONT. Sup. Ct. Vt. Certiorari denied. Reported below: 153 Vt. 102, 569 A. 2d 463.

No. 89–6637. LANE, AKA BROWN *v.* WHITTINGHILL ET AL. C. A. 7th Cir. Certiorari denied.

No. 89–6640. LEDET *v.* 15TH JUDICIAL DISTRICT COURT ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1085.

No. 89–6647. KLACSMANN *v.* FITCH. C. A. 11th Cir. Certiorari denied.

No. 89–6661. MARTINEZ *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 1088.

No. 89–6662. HILL ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 293.

No. 89–6688. MCCALLUM *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 892 F. 2d 84.

No. 89–6691. WRIGHT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1341.

No. 89-6707. HERNANDEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 890 F. 2d 1162.

No. 89-6709. GOLDEN *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89-6726. NORTON *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 476.

No. 89-6740. JAMES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied.

No. 89-6741. JACKSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89-6746. MAJOR *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1332.

No. 89-6747. MCCRUDDEN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 338.

No. 89-6754. GRANDINETTI *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 891 F. 2d 1302.

No. 88-7459. JONES *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 88-7461. WOOMER *v.* EVATT, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL. Sup. Ct. S. C.;
No. 88-7555. ROE *v.* OHIO. Sup. Ct. Ohio;
No. 89-5208. MCGEE *v.* TEXAS. Ct. Crim. App. Tex.;
No. 89-5478. MOORE *v.* KENTUCKY. Sup. Ct. Ky.;
No. 89-5624. SMITH *v.* SOUTH CAROLINA. Sup. Ct. S. C.;
No. 89-6003. STRONG *v.* PENNSYLVANIA. Sup. Ct. Pa.;
No. 89-6383. ANDREWS *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89-6385. FOWLER *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 89-6419. BREWER *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 89-6538. FIERRO *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir.;
No. 89-6571. SLOAN *v.* MISSOURI. Sup. Ct. Mo.;
No. 89-6608. FOX *v.* OKLAHOMA. Ct. Crim. App. Okla.;
No. 89-6653. WALLS *v.* MISSOURI. Sup. Ct. Mo.; and
No. 89-6785. HEISHMAN *v.* CALIFORNIA. Sup. Ct. Cal. Certiorari denied. Reported below: No. 88-7459, 298 S. C. 118,

378 S. E. 2d 594; No. 88–7555, 41 Ohio St. 3d 18, 535 N. E. 2d 1351; No. 89–5208, 774 S. W. 2d 229; No. 89–5478, 771 S. W. 2d 34; No. 89–5624, 298 S. C. 482, 381 S. E. 2d 724; No. 89–6003, 522 Pa. 445, 563 A. 2d 479; No. 89–6383, 49 Cal. 3d 200, 776 P. 2d 285; No. 89–6385, 779 P. 2d 580; No. 89–6538, 879 F. 2d 1276; No. 89–6571, 779 S. W. 2d 580; No. 89–6608, 779 P. 2d 562; No. 89–6653, 779 S. W. 2d 560.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–527. CALLAHAN, SUPERINTENDENT, MCNEIL ISLAND CORRECTION FACILITY *v.* ROBTOY; and DUCHARME, SUPERINTENDENT, WASHINGTON STATE REFORMATORY *v.* NORMAN. C. A. 9th Cir. Motions of respondents for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 871 F. 2d 1478 (first case) and 1483 (second case).

No. 89–707. SIMMONS, CHAIRMAN, KENTUCKY PAROLE BOARD, ET AL. *v.* DUNN. C. A. 6th Cir. Motion of respondent for leave to proceed *in forma pauperis* granted. Certiorari denied. Reported below: 877 F. 2d 1275.

No. 89–1142. FERLAUTO ET AL. *v.* NEW JERSEY ET AL. Sup. Ct. N. J. Motion of petitioners to defer consideration of the petition for writ of certiorari denied. Certiorari denied. Reported below: 116 N. J. 236, 561 A. 2d 552.

No. 89–1254. WHITFIELD *v.* COCA-COLA CO. ET AL. C. A. 3d Cir. Certiorari denied. JUSTICE BLACKMUN took no part in the consideration or decision of this petition. Reported below: 893 F. 2d 1333.

No. 89–1258. BHANDARI *v.* FIRST NATIONAL BANK OF COMMERCE. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 609.

JUSTICE WHITE, with whom JUSTICE O'CONNOR joins, dissenting.

This petition presents the issue whether 42 U. S. C. § 1981 (1982 ed.) prohibits alienage discrimination in the making of private contracts. When first considering this case, the Fifth Circuit in banc held that § 1981 does not have this effect. *Bhandari* v. *First National Bank of Commerce*, 829 F. 2d 1343 (1987). Petitioner sought review here. We granted the petition, vacated the Fifth Circuit's judgment, and remanded the case so that the Court of Appeals might reconsider its holding in light of our decision in *Patterson* v. *McLean Credit Union*, 491 U. S. 164 (1989). See 492 U. S. 901 (1989). Reaffirming *Runyon* v. *McCrary*, 427 U. S. 160 (1976), we held in *Patterson* that § 1981 covers acts of private discrimination. On remand, the Fifth Circuit declined to alter its original holding. The in banc court reasoned that *Patterson* was inapposite because that case concerned private racial discrimination whereas this case involves private alienage discrimination. 887 F. 2d 609 (1989).

I would grant the petition because it is not clear to me that § 1981 should be construed to prohibit private, as well as official, discrimination on the basis of race, but to prohibit only governmental discrimination on the basis of alienage. Prior cases, see *Graham* v. *Richardson*, 403 U. S. 365, 377 (1971), and *Takahashi* v. *Fish and Game Comm'n*, 334 U. S. 410, 419 (1948), have indicated that § 1981 prohibits official discrimination against aliens. In *Runyon*, we held that § 1981 extends to private conduct, a holding reaffirmed in *Patterson*. Certiorari should be granted to settle whether § 1981 proscribes private alienage discrimination.

No. 89–6123. DELVECCHIO *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied. Reported below: 129 Ill. 2d 265, 544 N. E. 2d 312.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

Adhering to my view that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 231 (1976) (MARSHALL, J., dissenting), I would grant the petition for certiorari and vacate the death sentence in this case. Even if I did not hold this view, I would grant the petition to consider whether the trial judge's failure to recuse himself violated petitioner's due process right to be tried and sentenced by an impartial judge. For the reasons set forth in Justice Clark's dissent in this case, 129 Ill. 2d 265, 297–302, 544 N. E. 2d 312, 327–330 (1989), I believe that the trial judge's participation in this case, given his involvement in the prosecution of a 1965 murder charge against the defendant, presented an unacceptable appearance of partiality. The Court has previously considered only charges that the adjudicator has a "direct, personal, substantial, pecuniary interest" in the case before him, *Tumey* v. *Ohio*, 273 U. S. 510, 523 (1927), or allegations that the judge was influenced by generalized hostility towards certain kinds of private businesses, *Aetna Life Insurance Co.* v. *Lavoie*, 475 U. S. 813, 820 (1986). Because I believe we should now consider petitioner's very different contentions of improper bias on the part of the trial judge, I dissent.

Rehearing Denied

No. 89–6044. COLLIER *v.* EVANS ET AL., 493 U. S. 1047. Petition for rehearing denied.

No. 88–6580. PORTWOOD, AKA TUCKER, ET AL. *v.* UNITED STATES, 490 U. S. 1069;

No. 89–5819. HOLMES *v.* HORTON, WARDEN, ET AL., 493 U. S. 996; and

No. 89–6118. ALSTON *v.* LEEKE, COMMISSIONER, SOUTH CAROLINA DEPARTMENT OF CORRECTIONS, ET AL., 493 U. S. 1034. Motions for leave to file petitions for rehearing denied.

MARCH 28, 1990

Miscellaneous Order

No. A–650. CLINTON, GOVERNOR OF ARKANSAS, ET AL. *v.* JEFFERS ET AL. D. C. E. D. Ark. Application for stay pending appeal, addressed to THE CHIEF JUSTICE and referred to the Court, denied.

MARCH 30, 1990

Probable Jurisdiction Noted

No. 89–1433. UNITED STATES *v.* EICHMAN ET AL. Appeal from D. C. D. C.; and

No. 89–1434. UNITED STATES *v.* HAGGERTY ET AL. Appeal from D. C. W. D. Wash. Motion of the Speaker and Leadership Group of the House of Representatives for leave to file, as *amici curiae*, a printed brief that differs from the previously submitted typewritten brief granted. Motion of the Solicitor General to expedite consideration of the statements as to jurisdiction granted. Probable jurisdiction noted, cases consolidated, and a total of one hour allotted for oral argument. The brief of the Solicitor General is to be filed with the Clerk of the Court and served upon appellees on or before 3:00 p.m., Wednesday, April 18, 1990. The briefs of the appellees are to be filed with the Clerk of the Court and served upon the Solicitor General on or before 3:00 p.m., Thursday, May 3, 1990. Any reply brief is to be filed with the Clerk of the Court and served upon appellees on or before 3:00 p.m., Thursday, May 10, 1990. Cases are set for oral argument at 10:00 a.m., Monday, May 14, 1990. Reported below: No. 89–1433, 731 F. Supp. 1123; No. 89–1434, 731 F. Supp. 415.

APRIL 2, 1990

Certiorari Dismissed

No. 89–6561. MOSS *v.* UNITED STATES. C. A. 11th Cir. Certiorari dismissed. Reported below: 891 F. 2d 905.

Miscellaneous Orders

No. — — ——. KEANE *v.* NEW YORK. Motion to direct the Clerk to docket an appeal that does not comply with the Rules of this Court denied.

No. A–683. VASQUEZ, WARDEN *v.* HARRIS. Application of the Attorney General of California to vacate the order of the United States Court of Appeals for the Ninth Circuit, dated March 30, 1990, staying the execution of sentence of death, presented to JUSTICE O'CONNOR, and by her referred to the Court, denied. THE CHIEF JUSTICE, JUSTICE SCALIA, and JUSTICE KENNEDY would grant the application.

No. D–851. IN RE DISBARMENT OF DWORKIN. Disbarment entered. [For earlier order herein, see 493 U. S. 1040.]

No. D–886. IN RE DISBARMENT OF MCCANN. It is ordered that Frank Moses McCann, of Lynchburg, Va., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–887. IN RE DISBARMENT OF ARAGON. It is ordered that Leopoldo Thomas Aragon, of Jackson, Miss., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–888. IN RE DISBARMENT OF RABEN. It is ordered that Ronald J. Raben, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–889. In re Disbarment of Mazur. It is ordered that Jack Martin Mazur, of St. Louis, Mo., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 89–1296. Oklahoma Natural Gas Co. *v.* Williams Natural Gas Co. et al. C. A. 10th Cir. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 89–1303. Reserve Life Insurance Co. *v.* Eichenseer. C. A. 5th Cir. Motion of Aetna Casualty & Surety Co. for leave to file a brief as *amicus curiae* granted.

No. 89–6892. In re Stelten. Petition for writ of habeas corpus denied.

Certiorari Granted

No. 89–1279. Pacific Mutual Life Insurance Co. *v.* Haslip et al. Sup. Ct. Ala. Certiorari granted. Reported below: 553 So. 2d 537.

Certiorari Denied

No. 89–46. Wood et al. *v.* General Motors Corp. C. A. 1st Cir. Certiorari denied. Reported below: 865 F. 2d 395.

No. 89–279. Kitts, as Personal Representative of the Estate of Kitts *v.* General Motors Corp. C. A. 10th Cir. Certiorari denied. Reported below: 875 F. 2d 787.

No. 89–459. Delta Air Lines, Inc. *v.* Association of Flight Attendants, AFL–CIO. C. A. D. C. Cir. Certiorari denied. Reported below: 279 U. S. App. D. C. 60, 879 F. 2d 906.

No. 89–778. Hollander *v.* United States District Court for the Eastern District of Missouri. C. A. 8th Cir. Certiorari denied.

No. 89–852. Taylor et al. *v.* General Motors Corp. et al. C. A. 11th Cir. Certiorari denied. Reported below: 875 F. 2d 816.

No. 89-879. STANGLER, DIRECTOR, DEPARTMENT OF SOCIAL SERVICES OF MISSOURI *v.* DARLING ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 2d 1069.

No. 89-940. MEIER ET AL. *v.* NISSAN MOTOR CORPORATION IN U. S. A. ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 980, 261 Cal. Rptr. 80.

No. 89-1085. SEXTON *v.* ARKANSAS SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT. Sup. Ct. Ark. Certiorari denied. Reported below: 299 Ark. 439, 774 S. W. 2d 114.

No. 89-1118. NEW LIFE BAPTIST CHURCH ACADEMY ET AL. *v.* TOWN OF EAST LONGMEADOW ET AL. C. A. 1st Cir. Certiorari denied. Reported below: 885 F. 2d 940.

No. 89-1247. H. K. PORTER CO., INC. *v.* TRANSAMERICA INSURANCE CO. C. A. 3d Cir. Certiorari denied. Reported below: 887 F. 2d 261.

No. 89-1264. CROWN CORK & SEAL CO., INC. *v.* MCNASBY ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 270.

No. 89-1267. ROSENTHAL *v.* STATE BAR OF CALIFORNIA. Sup. Ct. Cal. Certiorari denied.

No. 89-1273. INTERNATIONAL LOGISTICS GROUP, LTD. *v.* CHRYSLER CORP. C. A. 6th Cir. Certiorari denied. Reported below: 884 F. 2d 904.

No. 89-1284. FOWLER INDUSTRIES, INC., ET AL. *v.* INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 613. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 551.

No. 89-1285. AERON MARINE CO. *v.* MILES, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE SUCCESSION OF TORREGANO. C. A. 5th Cir. Certiorari denied. Reported below: 882 F. 2d 976.

No. 89-1286. FRANK *v.* MORANDO ET AL. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89-1288. SPEARS ET AL. *v.* CORNELIUS. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 348.

No. 89–1289. CHAPMAN *v.* HOMCO, INC. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 756.

No. 89–1291. MOSHKELGOSHA ET AL. *v.* PRINCE GEORGE'S COUNTY, MARYLAND. Ct. Sp. App. Md. Certiorari denied. Reported below: 79 Md. App. 768.

No. 89–1294. CASSILLY *v.* MARYLAND DEPARTMENT OF HUMAN RESOURCES ET AL. Ct. App. Md. Certiorari denied. Reported below: 317 Md. 573, 565 A. 2d 1015.

No. 89–1299. BLACKWELL *v.* CITY OF ST. LOUIS, MISSOURI, ET AL. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 778 S. W. 2d 711.

No. 89–1302. NZONGOLA *v.* GEORGIA ET AL. Super. Ct. Ga., Fulton County. Certiorari denied.

No. 89–1308. WILHELM ET UX. *v.* FIRST NATIONAL BANK & TRUST CO. ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–1337. GARDNER *v.* DELAWARE. Sup. Ct. Del. Certiorari denied. Reported below: 567 A. 2d 404.

No. 89–1342. CANDEE CONSTRUCTION CO., INC. *v.* MYERS ET AL. Sup. Ct. S. D. Certiorari denied. Reported below: 447 N. W. 2d 339.

No. 89–1369. SCHMIDT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 283.

No. 89–1387. BRIDGES *v.* NATIONWIDE MUTUAL INSURANCE CO. ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1387.

No. 89–1394. PENA *v.* NICHOLS, SHERIFF, OAKLAND COUNTY, MICHIGAN. C. A. 6th Cir. Certiorari denied.

No. 89–5984. BRADY *v.* MARTIN, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6162. HOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 885 F. 2d 871.

No. 89–6172. CAREY *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 884 F. 2d 547.

No. 89–6345. SCOTT *v.* SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN MATEO (CALIFORNIA, REAL PARTY IN INTEREST). Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 505, 260 Cal. Rptr. 608.

No. 89–6408. TAYLOR *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 891 F. 2d 287.

No. 89–6438. SMITH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 888 F. 2d 720.

No. 89–6589. OSPINA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 88.

No. 89–6634. ESTRADA RUIZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 890 F. 2d 588.

No. 89–6636. SHERRILLS *v.* PERINI. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1088.

No. 89–6644. WILEY *v.* CORRECTIONS CABINET OF KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1089.

No. 89–6645. JUSTICE *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 347.

No. 89–6650. HOWARD *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 777 S. W. 2d 888.

No. 89–6651. ABRAMSON ET AL. *v.* BATEMAN ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 888 F. 2d 1385.

No. 89–6654. RINGENBERG ET UX. *v.* CITY OF KAHOKA, MISSOURI, ET AL. C. A. 8th Cir. Certiorari denied.

No. 89–6659. GAVITT *v.* MICHIGAN. Ct. App. Mich. Certiorari denied.

No. 89–6663. HARDY *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 74 N. Y. 2d 948, 549 N. E. 2d 485.

No. 89–6667. WALTON *v.* NORTHEAST WOMEN'S CENTER, INC. C. A. 3d Cir. Certiorari denied. Reported below: 889 F. 2d 466.

No. 89–6671. GONZALEZ *v.* KEOHANE, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 280.

No. 89–6680. RAY *v.* UNITED STATES SENATE ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 1041.

No. 89–6685. McDONALD *v.* SULLIVAN. C. A. 10th Cir. Certiorari denied.

No. 89–6689. LANE *v.* CHISHOLM. Ct. App. Ind. Certiorari denied. Reported below: 543 N. E. 2d 688.

No. 89–6690. BOCHTER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89–6696. PRATHER *v.* PARKE, WARDEN. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1088.

No. 89–6701. BETANCOURT *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89–6704. GAINES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 80.

No. 89–6708. PAINTER *v.* BEYER, ADMINISTRATOR, NEW JERSEY STATE PRISON, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 897 F. 2d 523.

No. 89–6718. WICKSTROM *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89–6724. KRUSE *v.* KENTUCKY. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 1076.

No. 89–6725. JUSTICE *v.* CITY OF COLUMBUS ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 872 F. 2d 1026.

No. 89–6727. LAING *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Reported below: 281 U. S. App. D. C. 266, 889 F. 2d 281.

No. 89–6729. CANNON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1332.

No. 89–6733. JARAMILLO *v.* UNITED STATES; and
No. 89–6736. JARAMILLO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Reported below: 891 F. 2d 620.

No. 89–6737. LOWE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1088.

No. 89–6748. THAI DO HOANG *v.* KANSAS. Sup. Ct. Kan. Certiorari denied. Reported below: 245 Kan. 560, 781 P. 2d 731.

No. 89–6762. RODRIGUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 892 F. 2d 233.

No. 89–6781. GASTON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 881 F. 2d 1073.

No. 89–6782. ESCOBAR-GARCIA *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 893 F. 2d 124.

No. 89–6788. GRIFFITH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 1044.

No. 89–6798. ATKINS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 1368.

No. 89–6805. NEGRON-JESSURUN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89–6812. GARCIA *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 893 F. 2d 250.

No. 89–6815. WITHERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 892 F. 2d 1044.

No. 89–6827. WHYTE *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 892 F. 2d 1170.

No. 89–6830. ASHBY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 864 F. 2d 690.

No. 89–6843. MARTIN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 833 F. 2d 752.

No. 89–6864. FISHER *v.* FULCOMER, SUPERINTENDENT, STATE CORRECTIONAL INSTITUTION, HUNTINGTON, PENNSYLVANIA. Sup. Ct. Pa. Certiorari denied. Reported below: 524 Pa. 617, 571 A. 2d 380.

No. 89–6883. TERRY *v.* BLUE CAB, INC., ET AL. Ct. App. Wis. Certiorari denied.

No. 89–1141. MINNESOTA MINING & MANUFACTURING CO. *v.* FREEMAN. C. A. Fed. Cir. Certiorari denied. JUSTICE BLACK-

MUN took no part in the consideration or decision of this petition. Reported below: 884 F. 2d 1398.

No. 89–6126. DEGRAFFENREID *v.* MCKELLAR, WARDEN, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 883 F. 2d 68.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

"[O]urs is an accusatorial and not an inquisitorial system—a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth." *Rogers* v. *Richmond*, 365 U. S. 534, 541 (1961). Because the court below failed to examine fully whether petitioner's confession was obtained by inquisitorial means condemned by the Due Process Clause, I would grant certiorari in this case to clarify the nature of the voluntariness inquiry.

In 1973, Claude Killian was murdered. Police questioned petitioner Ray Charles Degraffenreid shortly after the murder, but he was not then charged. In 1977, Degraffenreid was arrested for Killian's murder while incarcerated in state prison on an unrelated conviction. Five days later, he confessed to law enforcement officials. At Degraffenreid's first trial, the state court granted his motion to suppress his confession as involuntary, and the jury was unable to reach a verdict. At Degraffenreid's retrial, a different judge admitted the confession. Degraffenreid was convicted of murder and sentenced to life imprisonment. His conviction was affirmed on appeal by the South Carolina Supreme Court. Degraffenreid then sought state postconviction relief, which was likewise denied.

In this federal habeas petition, petitioner renews his challenge to the admission of his confession. The District Court referred the petition to a Magistrate for findings of fact and recommendations. After conducting an evidentiary hearing, the Magistrate found that the State had failed to prove that the confession was voluntary. The District Court refused to adopt the Magistrate's recommendation on the ground that the Magistrate incorrectly allocated to the State the burden of proof regarding voluntariness. A divided panel of the Court of Appeals for the Fourth Circuit affirmed, 883 F. 2d 68 (1989), and the full court denied rehearing en banc by a vote of 6 to 5.

The record in this case is replete with factual findings by various state and federal judges. The Magistrate's findings, which set forth the essential and undisputed facts, are as follows:

> "[P]etitioner was held incommunicado for three (3) to five (5) days in solitary confinement. He had no exercise, no visitors, no telephone calls. He ate, slept, bathed, and existed within this one cell. There were no magazines, radios, television, books or other diversions. The only window was an observation window in the cell door which when open revealed the hall and the door to the sheriff's office. The only time the petitioner was taken out of this reportedly cold cell was for questioning.
>
> "The only safeguard taken to protect the petitioner's rights was the giving of *Miranda* warnings. Despite the presence of judicial officers on the grounds of the facility and procedures for transporting prisoners to other court officials, the petitioner was not taken before a judicial officer, was not appointed an attorney and was not given any conditions of release until after he confessed." App. to Pet. for Cert. A–45.

It is also uncontested that prison officials placed a notice on the wall of the prison facility indicating that petitioner was to have no visitors or phone calls. From these facts the Magistrate concluded that "despite the advice of rights, the only way the petitioner was going to be released from solitary confinement and allowed contact with third parties was to give a confession." *Id.*, at A–47.

The Court of Appeals did not reject this account of the facts and indeed noted that "[t]he delay in taking Degraffenreid before a judicial officer should not be sanctioned as ideal procedure." *Id.*, at A–9. The court nonetheless ruled that Degraffenreid failed to establish "that the circumstances surrounding the confession were sufficiently egregious to cause Degraffenreid's will to be overborne." *Ibid.*

In *Miller* v. *Fenton*, 474 U. S. 104 (1985), we held that "the ultimate question of the admissibility of a confession merits treatment as a legal inquiry requiring plenary federal review." *Id.*, at 115. We identified two distinct questions that courts must ask in determining "voluntariness": "whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means [and] whether the defendant's will was in fact overborne." *Id.*, at 116 (citing *Gallegos* v. *Colorado*, 370 U. S. 49, 51 (1962)). These two inquiries safeguard two fundamental societal interests. The first inquiry ensures that inquisitorial means do not infect the criminal process. See *Gallegos, supra*, at 51. It is premised on our abiding belief "that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed." *Chambers* v. *Florida*, 309 U. S. 227, 237 (1940); see also *Miller, supra*, at 109 ("This Court has long held that certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment"). The second inquiry, by focusing on whether a defendant's will was in fact overborne, safeguards the Fifth Amendment right to be free from compelled self-incrimination. See *Gallegos, supra*, at 51.

In this case, the Court of Appeals focused solely on the second inquiry and failed to decide whether, as a matter of due process, the police efforts in this case were impermissibly inquisitorial. This analysis is essential because some police techniques, whether or not they actually overbear a defendant's will, are repugnant to our adversarial system and cannot lay the foundation for a criminal conviction. *Brown* v. *Mississippi*, 297 U. S. 278, 286 (1936) ("The due process clause requires 'that state action . . . shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'") (quoting *Hebert* v. *Louisiana*, 272 U. S. 312, 316 (1926)); *Rogers*, 365 U. S., at 540–541 (the Due Process Clause requires suppression of confessions improperly obtained "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law"). Here, law enforcement officials isolated petitioner from the outside world and made unmistakably clear that his incommunicado detention would end only with his confession. Cf. *Haynes* v. *Washington*, 373 U. S. 503, 514 (1963) ("We cannot blind ourselves to what experience unmistakably teaches: that even apart from the express threat, the basic techniques present here—the secret and incommunicado detention and interrogation—are devices adapted and used to extort confessions from suspects"). Such techniques arguably do not conform "to the fundamental standards" of our criminal justice system. *Chambers*, *supra*, at 238. Because the Court of Appeals did not consider that possibility, I would grant certiorari in this case to clarify the dual nature of our voluntariness inquiry.

No. 89-6333. DAVIS *v.* MISSISSIPPI. Sup. Ct. Miss.;
No. 89-6477. BRISBON *v.* ILLINOIS. Sup. Ct. Ill.;
No. 89-6518. LINDSEY *v.* LOUISIANA. Sup. Ct. La.;
No. 89-6609. WATKINS *v.* VIRGINIA. Sup. Ct. Va.;
No. 89-6624. HICKS *v.* KEMP, WARDEN. Super. Ct. Ga., Butts County;
No. 89-6633. SPIVEY *v.* KEMP, WARDEN. Sup. Ct. Ga.;
No. 89-6660. WILCOXSON *v.* TENNESSEE. Sup. Ct. Tenn.; and
No. 89-6822. PARKER *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL. C. A. 11th Cir. Certiorari denied. Reported below: No. 89-6333, 551 So. 2d 165; No. 89-6477, 129 Ill. 2d 200, 544 N. E. 2d 297; No. 89-6518, 543 So. 2d 886; No. 89-6609, 238 Va. 341, 385 S. E. 2d 50; No. 89-6660, 772 S. W. 2d 33.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

Rehearing Denied

No. 89-5949. MANG SUN WONG *v.* UNITED STATES; 493 U. S. 1082;
No. 89-6199. BOND *v.* RAIKES, JUDGE, ET AL., 493 U. S. 1062;
No. 89-6248. BYNUM *v.* UNITED STATES, 493 U. S. 1085;
No. 89-6356. SOLON *v.* UNITED STATES, 493 U. S. 1090;
No. 89-6384. SCIRE *v.* UNITED STATES, 493 U. S. 1090; and
No. 89-6396. MCCONE *v.* BIRGE ET AL., *ante*, p. 1006. Petitions for rehearing denied.

APRIL 16, 1990

Certiorari Granted—Vacated and Remanded

No. 88-7000. STRINGER *v.* BLACK, COMMISSIONER, MISSISSIPPI DEPARTMENT OF CORRECTIONS. C. A. 5th Cir. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clemons* v. *Mississippi, ante,* p. 738. Reported below: 862 F. 2d 1108.

No. 88–7358. PINKNEY *v.* MISSISSIPPI. Sup. Ct. Miss. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *Clemons* v. *Mississippi, ante,* p. 738. Reported below: 538 So. 2d 329.

No. 89–1040. CHAPPELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari granted, judgment vacated, and case remanded for further consideration in light of the position asserted by the Solicitor General in his brief filed February 27, 1990. Reported below: 878 F. 2d 384.

No. 89–6893. PETARY *v.* MISSOURI. Sup. Ct. Mo. Motion of petitioner for leave to proceed *in forma pauperis* granted. Certiorari granted, judgment vacated, and case remanded for further consideration in light of *McKoy* v. *North Carolina, ante,* p. 433, and *Boyde* v. *California, ante,* p. 370. Reported below: 781 S. W. 2d 534.

Miscellaneous Orders

No. — ———. CLARK *v.* COMMUNITY SERVICE PUBLISHING INC. ET AL. Motion to direct the Clerk to file petition for writ of certiorari out of time denied.

No. A–682 (89–1399). INTERNATIONAL SOCIETY FOR KRISHNA CONSCIOUSNESS OF CALIFORNIA ET AL. *v.* GEORGE ET AL. Ct. App. Cal., 4th App. Dist. Application for stay, presented to JUSTICE O'CONNOR, and by her referred to the Court, granted, and it is ordered that execution and enforcement of the judgment of the Court of Appeal of California, Fourth Appellate District, case No. D007153, entered August 30, 1989, and modified September 29, 1989, and that execution and enforcement of the order of the Superior Court of California, in and for the County of Orange, case No. 27 75 65, entered March 16, 1990, are stayed pending this Court's action on the petition for writ of certiorari. Should the petition for writ of certiorari be denied, this stay terminates automatically. In the event the petition for writ of certiorari is granted, this stay shall continue pending issuance of the mandate of this Court.

No. D–842. In re Disbarment of Eisenberg. Disbarment entered. [For earlier order herein, see 493 U. S. 988.]

No. D–845. In re Disbarment of Davis. Disbarment entered. [For earlier order herein, see 493 U. S. 988.]

No. D–862. In re Disbarment of Heller. Melvin A. Heller, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 20, 1990 [493 U. S. 1067], is hereby discharged.

No. D–863. In re Disbarment of Morris. Jerrold L. Morris, of Chicago, Ill., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 26, 1990 [*ante*, p. 1001], is hereby discharged.

No. D–865. In re Disbarment of Boyce. Earl Rumsey Boyce, of Palm Beach, Fla., having requested to resign as a member of the Bar of this Court, it is ordered that his name be stricken from the roll of attorneys admitted to practice before the Bar of this Court. The rule to show cause, heretofore issued on February 26, 1990 [*ante*, p. 1002], is hereby discharged.

No. D–866. In re Disbarment of Silveira. Disbarment entered. [For earlier order herein, see *ante*, p. 1002.]

No. D–890. In re Disbarment of Hancock. It is ordered that Mac W. Hancock III, of Houston, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–891. In re Disbarment of Day. It is ordered that George A. Day, of Brownwood, Tex., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. D–892. In re Disbarment of Shorter. It is ordered that John A. Shorter, Jr., of Washington, D. C., be suspended from the practice of law in this Court and that a rule issue, returnable within 40 days, requiring him to show cause why he should not be disbarred from the practice of law in this Court.

No. 88–2041. SISSON *v.* RUBY ET AL. C. A. 7th Cir. [Certiorari granted, 493 U. S. 1055.] Motion of the parties to dispense with printing the joint appendix granted. Motion of Hatteras Yachts Division of Genmar Industries, Inc., for leave to file a brief as *amicus curiae* granted.

No. 89–609. PUCKETT ET AL. *v.* NATIVE VILLAGE OF TYONEK ET AL. C. A. 9th Cir.; and
No. 89–1330. INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS ET AL. *v.* BROWN. C. A. 4th Cir. The Solicitor General is invited to file briefs in these cases expressing the views of the United States.

No. 89–645. MILKOVICH *v.* LORAIN JOURNAL CO. ET AL. Ct. App. Ohio, Lake County. [Certiorari granted, 493 U. S. 1055.] Motion of American Civil Liberties Union et al. for leave to file a brief as *amici curiae* granted.

No. 89–711. UNIVERSAL FABRICATORS, INC. *v.* SMITH ET AL., 493 U. S. 1070. Motion of respondent Carl Smith for approval of application for attorney's fees denied without prejudice to filing the motion in the United States Court of Appeals for the Fifth Circuit.

No. 89–1230. CITY OF CHICAGO ET AL. *v.* FRIEDRICH. C. A. 7th Cir. Motion of respondent to consolidate this case with No. 89–994, *West Virginia University Hospitals, Inc.* v. *Casey, Governor of Pennsylvania, et al.* [certiorari granted, *ante*, p. 1003], for purposes of oral argument denied.

No. 89–5900. RUST *v.* GUNTER ET AL. C. A. 8th Cir. [Certiorari granted, *ante*, p. 1055.] Motion for appointment of counsel granted, and it is ordered that Alvin J. Bronstein, Esq., of Washington, D. C., be appointed to serve as counsel for petitioner in this case.

No. 89–6818. IN RE HICKS. C. A. 10th Cir. Petition for writ of common-law certiorari denied.

No. 89–1382. IN RE FREED; and
No. 89–6613. IN RE DEBARDELEBEN. Petitions for writs of mandamus denied.

Certiorari Granted

No. 89–1298. INGERSOLL-RAND CO. *v.* MCCLENDON. Sup. Ct. Tex. Motions of Chamber of Commerce of the United States of America, American Paper Institute, Inc., and Equal Employment Advisory Council for leave to file briefs as *amici curiae* granted. Certiorari granted. Reported below: 779 S. W. 2d 69.

Certiorari Denied. (See also No. 89–6818, *supra.*)

No. 89–644. ROBINSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBINSON *v.* TOWNSHIP OF WATERFORD ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 883 F. 2d 75.

No. 89–709. MICHIGAN *v.* HAWKINS. Ct. App. Mich. Certiorari denied.

No. 89–1023. DUBOIS ET AL. *v.* HOCKING. C. A. 9th Cir. Certiorari denied. Reported below: 885 F. 2d 1449.

No. 89–1041. MISSISSIPPI ET AL. *v.* FEDERAL ENERGY REGULATORY COMMISSION. C. A. D. C. Cir. Certiorari denied. Reported below: 277 U. S. App. D. C. 346, 875 F. 2d 903.

No. 89–1094. LITTLE EARTH OF UNITED TRIBES, INC., ET AL. *v.* KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT. C. A. 8th Cir. Certiorari denied. Reported below: 878 F. 2d 236.

No. 89–1098. NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES *v.* NEWMAN, DIRECTOR, OFFICE OF PERSONNEL MANAGEMENT. C. A. D. C. Cir. Certiorari denied. Reported below: 279 U. S. App. D. C. 27, 879 F. 2d 873.

No. 89–1105. ZINNIEL ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. Reported below: 883 F. 2d 1350.

No. 89–1108. BIRNBAUM ET AL. *v.* NEW YORK. Ct. App. N. Y. Certiorari denied. Reported below: 73 N. Y. 2d 638, 541 N. E. 2d 23.

No. 89–1110. EDUCATIONAL DEVELOPMENT NETWORK CORP. ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 884 F. 2d 737.

No. 89–1131. LIAO *v.* DEAN ET AL. C. A. 11th Cir. Certiorari denied. Reported below: 867 F. 2d 1366.

No. 89–1140. Doe *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 384.

No. 89–1160. Michigan et al. *v.* Panhandle Eastern Pipe Line Co. et al. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 1295.

No. 89–1161. Michigan et al. *v.* Federal Energy Regulatory Commission. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 45, 883 F. 2d 117.

No. 89–1173. Luskin *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 867.

No. 89–1175. Nuclear Transport & Storage, Inc. *v.* United States, Acting Through its Department of Energy, et al. C. A. 6th Cir. Certiorari denied. Reported below: 890 F. 2d 1348.

No. 89–1176. Horton Automatics *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 574.

No. 89–1194. Park Center Water District *v.* United States et al. Sup. Ct. Colo. Certiorari denied. Reported below: 781 P. 2d 90.

No. 89–1198. Marroquin *v.* United States. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 1240.

No. 89–1203. Kentucky *v.* Peterson. Ct. App. Ky. Certiorari denied.

No. 89–1209. Chicago & North Western Transportation Co. *v.* Railway Labor Executives' Assn. et al. C. A. 8th Cir. Certiorari denied. Reported below: 888 F. 2d 1227.

No. 89–1253. Blount County Board of Education et al. *v.* Nichols. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 419.

No. 89–1262. International Union of Operating Engineers, Local 660, et al. *v.* Hester. C. A. 11th Cir. Certiorari denied. Reported below: 878 F. 2d 1309.

No. 89–1270. McNell et al. *v.* Hugel. C. A. 1st Cir. Certiorari denied. Reported below: 886 F. 2d 1.

No. 89–1274. ALBERT ET AL. *v.* AVERY, INC., ET AL. C. A. 2d Cir. Certiorari denied. Reported below: 902 F. 2d 1556.

No. 89–1306. CONSTRUCTION ENGINEERS, INC., ET AL. *v.* CONWAY CORP. ET AL. Sup. Ct. Ark. Certiorari denied. Reported below: 300 Ark. 225, 782 S. W. 2d 36.

No. 89–1310. REID *v.* WHITE MOTOR CORP. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 1462.

No. 89–1312. AMES *v.* AMES ET AL. Sup. Ct. Tex. Certiorari denied. Reported below: 776 S. W. 2d 154.

No. 89–1314. ROSSCO HOLDINGS INC., DBA QUAKER CORP., ET AL. *v.* CALIFORNIA ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 642, 260 Cal. Rptr. 736.

No. 89–1319. TARKA *v.* FRANKLIN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 102.

No. 89–1323. ZETTL *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 51.

No. 89–1325. GARDNER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 280.

No. 89–1327. RAMOS *v.* BETHLEHEM STEEL CORP. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1382.

No. 89–1328. GOODRICH *v.* COUNTY OF LOS ANGELES. Ct. App. Cal., 2d App. Dist. Certiorari denied.

No. 89–1329. WILLIAMS *v.* ILLINOIS CENTRAL GULF RAILROAD CO. Sup. Ct. Ala. Certiorari denied. Reported below: 554 So. 2d 440.

No. 89–1331. GWIRTZ ET AL. *v.* OHIO EDUCATION ASSN. C. A. 6th Cir. Certiorari denied. Reported below: 887 F. 2d 678.

No. 89–1333. SANDERS *v.* SOUTH CENTRAL BELL TELEPHONE CO. C. A. 5th Cir. Certiorari denied. Reported below: 888 F. 2d 1390.

No. 89–1334. ROSENTHAL *v.* YOUNG ET AL. Ct. App. Cal., 2d App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 96, 260 Cal. Rptr. 369.

No. 89–1339. Ackley, dba Village Square Chevron, et al. *v.* Gulf Oil Corp. et al. C. A. 2d Cir. Certiorari denied. Reported below: 889 F. 2d 1280.

No. 89–1340. Washburn *v.* Sheedy. Ct. App. Cal., 4th App. Dist. Certiorari denied.

No. 89–1341. Ramirez *v.* Transamerican Natural Gas Corp. et al. C. A. 5th Cir. Certiorari denied.

No. 89–1348. Clayton, a Minor, by Clayton, his Next Friend, et al. *v.* Place et al. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 2d 376.

No. 89–1350. Fragante *v.* City and County of Honolulu et al. C. A. 9th Cir. Certiorari denied. Reported below: 888 F. 2d 591.

No. 89–1351. Caramadre *v.* Fulcomer, Superintendent, State Correctional Institution at Huntingdon, et al. C. A. 3d Cir. Certiorari denied.

No. 89–1352. Hass *v.* Oregon State Bar. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1453.

No. 89–1354. Maxwell *v.* Goodwin et al. C. A. 4th Cir. Certiorari denied. Reported below: 885 F. 2d 157.

No. 89–1355. Baum, Individually and as Executor of the Estate of Baum, et al. *v.* Egan et ux. App. Ct. Ill., 1st Dist. Certiorari denied. Reported below: 184 Ill. App. 3d 1104, 562 N. E. 2d 406.

No. 89–1356. Stanko *v.* Giove. C. A. 8th Cir. Certiorari denied. Reported below: 882 F. 2d 1316.

No. 89–1358. Kaloa et al. *v.* Native Village of Tyonek et al. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1024.

No. 89–1359. Hill Resources, Inc. *v.* Cuesta Energy Corp. C. A. 10th Cir. Certiorari denied.

No. 89–1362. Washington Mills Electro Minerals Corp. et al. *v.* DeLong Equipment Co. C. A. 11th Cir. Certiorari denied. Reported below: 887 F. 2d 1499.

No. 89-1370. Gaceta et al. *v.* County of Santa Clara et al. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1023.

No. 89-1374. Eason *v.* Dugger, Secretary, Florida Department of Corrections. C. A. 11th Cir. Certiorari denied. Reported below: 892 F. 2d 88.

No. 89-1389. DeMartino *v.* New York City Transit Authority et al. App. Div., Sup. Ct. N. Y., 2d Jud. Dept. Certiorari denied. Reported below: 149 App. Div. 2d 705, 540 N. Y. S. 2d 499.

No. 89-1390. Louisiana Insurance Guaranty Assn. *v.* Abbott. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 626.

No. 89-1393. Fugate *v.* Borg Textile Corp. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1069.

No. 89-1400. City of Longmont, Colorado *v.* Oakley. C. A. 10th Cir. Certiorari denied. Reported below: 890 F. 2d 1128.

No. 89-1403. Vale *v.* Cooke et al. C. A. 5th Cir. Certiorari denied. Reported below: 885 F. 2d 869.

No. 89-1410. Zannino *v.* United States. C. A. 1st Cir. Certiorari denied. Reported below: 895 F. 2d 1.

No. 89-1417. Zeltzer *v.* Samuels, Acting Commissioner of Patents and Trademarks. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1050.

No. 89-1422. Rost *v.* Frank, Postmaster General, United States Postal Service. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1395.

No. 89-1423. Cook *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 89-1429. Guerrero *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 89-1468. Jeffers *v.* Veterans Administration. C. A. Fed. Cir. Certiorari denied. Reported below: 892 F. 2d 1050.

No. 89–1478. Scalise et al. *v.* Thornburgh, Attorney General of the United States, et al. C. A. 7th Cir. Certiorari denied. Reported below: 891 F. 2d 640.

No. 89–1488. Joshua Basin Partnership et al. *v.* United States Department of the Interior. C. A. 10th Cir. Certiorari denied.

No. 89–1492. Collier *v.* New Jersey. Super. Ct. N. J., App. Div. Certiorari denied.

No. 89–5981. Liner *v.* Jones et al. C. A. 4th Cir. Certiorari denied. Reported below: 881 F. 2d 1069.

No. 89–6184. Callanan *v.* United States; and
No. 89–6203. Callanan *v.* United States. C. A. 6th Cir. Certiorari denied. Reported below: 881 F. 2d 229.

No. 89–6311. Gamble *v.* Jones, Superintendent, Missouri Training Center for Men. Sup. Ct. Mo. Certiorari denied.

No. 89–6363. Scroggins *v.* United States. C. A. 11th Cir. Certiorari denied. Reported below: 880 F. 2d 1204.

No. 89–6367. Leeds *v.* Department of Commerce; and Leeds *v.* Quigg, Commissioner of Patents and Trademarks. C. A. Fed. Cir. Certiorari denied. Reported below: 887 F. 2d 1095 (first case) and 1094 (second case).

No. 89–6377. Crawford *v.* Davis et al. C. A. 6th Cir. Certiorari denied.

No. 89–6386. Anderson *v.* Rockwell International, Inc., et al. C. A. 9th Cir. Certiorari denied. Reported below: 865 F. 2d 263.

No. 89–6417. Jones *v.* Celotex Corp. et al. C. A. 5th Cir. Certiorari denied. Reported below: 887 F. 2d 1084.

No. 89–6421. Ely *v.* Hagg et al. C. A. 4th Cir. Certiorari denied. Reported below: 884 F. 2d 1388.

No. 89–6434. Villasenor *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 884 F. 2d 1396.

No. 89–6450. Ross *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 264.

No. 89-6467. TIGGS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1321.

No. 89-6476. CARVER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 292.

No. 89-6493. SMITH *v.* DORSEY, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 89-6499. WELLS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 886 F. 2d 1312.

No. 89-6503. ROMERO-REYNA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 559.

No. 89-6520. LAROCCO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied.

No. 89-6549. KINNELL *v.* SAFFELS, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6664. QUIMBY *v.* MCMACKIN, SUPERINTENDENT, MARION CORRECTIONAL INSTITUTION. C. A. 6th Cir. Certiorari denied. Reported below: 890 F. 2d 416.

No. 89-6665. RODMAN *v.* WILSON, DIRECTOR, OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 886 F. 2d 330.

No. 89-6672. FAUGHN *v.* CAMPBELL. C. A. 10th Cir. Certiorari denied.

No. 89-6674. BROWN *v.* BI-STATE DEVELOPMENT ET AL. C. A. 8th Cir. Certiorari denied. Reported below: 890 F. 2d 419.

No. 89-6676. BYNUM *v.* ANDERSON, CHIEF JUDGE. Sup. Ct. Fla. Certiorari denied. Reported below: 557 So. 2d 35.

No. 89-6678. WILLIAMS *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89-6681. POWELL *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89–6682. GRAY *v.* CITY OF HOUSTON ET AL. C. A. 5th Cir. Certiorari denied.

No. 89–6684. NORTHARD *v.* NAGLE, WARDEN, ET AL. C. A. 11th Cir. Certiorari denied.

No. 89–6687. MAZO *v.* NEWSOME, WARDEN. C. A. 11th Cir. Certiorari denied.

No. 89–6697. BUCKLEY *v.* KLEVENHAGEN ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 273.

No. 89–6698. DELLENBACH *v.* LETSINGER ET AL. C. A. 7th Cir. Certiorari denied. Reported below: 889 F. 2d 755.

No. 89–6703. ROSS *v.* JEFFES ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 1382.

No. 89–6706. BERBICK *v.* PROVIDENT NATIONAL BANK ET AL. Sup. Ct. Pa. Certiorari denied.

No. 89–6711. ALLISON *v.* OHIO DISCIPLINARY COUNSEL. Sup. Ct. Ohio. Certiorari denied. Reported below: 44 Ohio St. 3d 100, 541 N. E. 2d 70.

No. 89–6712. THOMAS *v.* COWLEY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89–6713. BROOKE *v.* CALIFORNIA (two cases). Ct. App. Cal., 1st App. Dist. Certiorari denied.

No. 89–6714. WILLIAMS *v.* OKLAHOMA. Ct. Crim. App. Okla. Certiorari denied.

No. 89–6720. FRANCOIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 889 F. 2d 1341.

No. 89–6721. BROWN *v.* VIRGINIA EMPLOYMENT COMMISSION ET AL. Ct. App. Va. Certiorari denied.

No. 89–6723. GALLAGHER *v.* MORROW COUNTY LAW LIBRARY ASSN. ET AL. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1087.

No. 89–6732. MOROVITZ *v.* MOROVITZ. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 778 S. W. 2d 369.

No. 89–6734. JOHNSON *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 777 S. W. 2d 876.

No. 89-6738. Lee *v.* Hudson. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 402.

No. 89-6742. Noheart *v.* Riveland, Secretary, Washington Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 875 F. 2d 319.

No. 89-6744. Lightsey *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 89-6749. R. J. *v.* Kahn. Ct. App. Mo., Eastern Dist. Certiorari denied. Reported below: 778 S. W. 2d 239.

No. 89-6751. Williams *v.* LeCureux, Warden. C. A. 6th Cir. Certiorari denied.

No. 89-6752. Ballard *v.* Oklahoma. Ct. Crim. App. Okla. Certiorari denied.

No. 89-6755. Sindram *v.* Ahalt, Judge, Circuit Court of Prince George's County, Maryland, et al. C. A. 4th Cir. Certiorari denied. Reported below: 892 F. 2d 75.

No. 89-6756. O. M. *v.* District of Columbia et al. Ct. App. D. C. Certiorari denied. Reported below: 565 A. 2d 573.

No. 89-6759. Leonard *v.* Scully, Superintendent, Green Haven Correctional Facility, et al. C. A. 2d Cir. Certiorari denied.

No. 89-6761. Sakovich *v.* St. Mary's Hospital et al. App. Ct. Ill., 3d Dist. Certiorari denied. Reported below: 176 Ill. App. 3d 1174, 549 N. E. 2d 361.

No. 89-6763. Craig *v.* McCarthy, Director, California Department of Corrections, et al. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1023.

No. 89-6766. Outlaw *v.* O'Leary, Warden, et al. C. A. 7th Cir. Certiorari denied.

No. 89-6768. Brown *v.* Clanton et al. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 274.

No. 89-6770. Ana Leon T. *v.* Federal Reserve Bank of Chicago et al. C. A. 6th Cir. Certiorari denied. Reported below: 888 F. 2d 1391.

No. 89-6771. BROWN *v.* KENTUCKY. Sup. Ct. Ky. Certiorari denied. Reported below: 780 S. W. 2d 627.

No. 89-6772. BRANDON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Reported below: 894 F. 2d 402.

No. 89-6773. GEIGER *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 891 F. 2d 512.

No. 89-6774. SMITH *v.* QUARLES, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 89-6775. SIVLEY *v.* A. H. ROBINS CO., INC. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1081.

No. 89-6776. RAMSEYER *v.* CODY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6779. HERNDON *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied. Reported below: 894 F. 2d 404.

No. 89-6784. HARVEY *v.* MCHUGH ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1079.

No. 89-6789. BATTEN *v.* WATTS CYCLE & MARINE, INC., ET AL. Sup. Ct. Mont. Certiorari denied. Reported below: 240 Mont. 113, 783 P. 2d 378.

No. 89-6790. GAINES *v.* COLLINS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION. C. A. 5th Cir. Certiorari denied.

No. 89-6791. LOPEZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 891 F. 2d 284.

No. 89-6796. LODHI *v.* STATE BOARD OF LAW EXAMINERS ET AL. Ct. App. N. Y. Certiorari denied.

No. 89-6799. BENGIOVANNI *v.* CALIFORNIA. Ct. App. Cal., 1st App. Dist. Certiorari denied. Reported below: 212 Cal. App. 3d 1099, 261 Cal. Rptr. 45.

No. 89-6800. BORELLI *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1332.

No. 89-6802. WESTER *v.* MARICOPA COUNTY SUPERIOR COURT. C. A. 9th Cir. Certiorari denied. Reported below: 883 F. 2d 1025.

No. 89-6803. HEIMBERGER *v.* REES ET AL. Sup. Ct. Ohio. Certiorari denied. Reported below: 47 Ohio St. 3d 702, 547 N. E. 2d 986.

No. 89-6806. HARRELL *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir. Certiorari denied. Reported below: 889 F. 2d 274.

No. 89-6807. HOPE *v.* ILLINOIS. Sup. Ct. Ill. Certiorari denied.

No. 89-6808. JAXON *v.* CIRCLE K CORP. ET AL. C. A. 10th Cir. Certiorari denied.

No. 89-6809. KNOX *v.* BUTLER, WARDEN. C. A. 5th Cir. Certiorari denied. Reported below: 884 F. 2d 849.

No. 89-6810. LEWIS *v.* MOODY, SUPERINTENDENT, WILDWOOD CORRECTIONAL CENTER. Ct. App. Alaska. Certiorari denied.

No. 89-6816. MONTGOMERY, INDIVIDUALLY AND AS TRUSTEE OF THE D & R CAVE CREEK TRUST *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 893 F. 2d 343.

No. 89-6817. MAKER *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied.

No. 89-6820. BUCHANAN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Reported below: 891 F. 2d 1436.

No. 89-6821. COVINGTON *v.* BARNETT, SUPERINTENDENT, NORTH CAROLINA EASTERN CORRECTIONAL INSTITUTION, ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1078.

No. 89-6829. WAGNER ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 884 F. 2d 1090.

No. 89-6833. GARCIA *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Reported below: 889 F. 2d 1454.

No. 89-6835. WATTS *v.* FOSTER ET AL. C. A. 4th Cir. Certiorari denied. Reported below: 887 F. 2d 1082.

No. 89–6838. McDonald *v.* Yellow Cab Metro, Inc. C. A. 6th Cir. Certiorari denied. Reported below: 891 F. 2d 291.

No. 89–6845. Drew *v.* United States. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 965.

No. 89–6846. Bailey *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 893 F. 2d 1332.

No. 89–6847. Miles *v.* Ohio. Ct. App. Ohio, Hamilton County. Certiorari denied.

No. 89–6852. Rivers *v.* United States. C. A. 7th Cir. Certiorari denied. Reported below: 895 F. 2d 424.

No. 89–6856. Washington *v.* United States. C. A. 9th Cir. Certiorari denied. Reported below: 886 F. 2d 1120.

No. 89–6857. Thomson *v.* United States. C. A. 3d Cir. Certiorari denied. Reported below: 888 F. 2d 300.

No. 89–6859. Pedroncelli *v.* United States. C. A. 10th Cir. Certiorari denied.

No. 89–6867. Bynum *v.* United States. C. A. 11th Cir. Certiorari denied.

No. 89–6869. Justice *v.* Ohio et al. C. A. 6th Cir. Certiorari denied. Reported below: 889 F. 2d 1087.

No. 89–6878. Baskin *v.* United States. C. A. D. C. Cir. Certiorari denied. Reported below: 280 U. S. App. D. C. 366, 886 F. 2d 383.

No. 89–6885. Stoner *v.* Kentucky. Ct. App. Ky. Certiorari denied.

No. 89–6888. Gulati *v.* United States. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1410.

No. 89–6890. Moore, aka Keener *v.* Buegler et al. C. A. 11th Cir. Certiorari denied. Reported below: 891 F. 2d 905.

No. 89–6891. Rivera *v.* Makel, Warden. C. A. 6th Cir. Certiorari denied. Reported below: 894 F. 2d 1337.

No. 89–6900. Desire *v.* United States. C. A. 4th Cir. Certiorari denied. Reported below: 896 F. 2d 547.

No. 89–6911. MATOUSEK *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Reported below: 894 F. 2d 1012.

No. 89–6912. TAYLOR *v.* DEPARTMENT OF HEALTH AND HUMAN SERVICES. C. A. Fed. Cir. Certiorari denied. Reported below: 891 F. 2d 299.

No. 89–6913. OBREGON *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1307.

No. 89–6918. WAX *v.* SULLIVAN, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 895 F. 2d 1411.

No. 89–6941. GUERRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Reported below: 888 F. 2d 247.

No. 89–6952. MAMI *v.* VAN ZANDT, SUPERINTENDENT, HUDSON CORRECTIONAL FACILITY. C. A. 2d Cir. Certiorari denied.

No. 89–6961. CONTRERAS-ESPINOSA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Reported below: 894 F. 2d 410.

No. 89–6973. CLARK *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. Reported below: 893 F. 2d 1277.

No. 88–7100. BENNER *v.* OHIO. Sup. Ct. Ohio;
No. 89–5167. TAFERO *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 89–5277. DEMPS *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. C. A. 11th Cir.;
No. 89–5331. ALVORD *v.* DUGGER, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS. Sup. Ct. Fla.;
No. 89–5485. CHERRY *v.* FLORIDA. Sup. Ct. Fla.;
No. 89–5686. ALLISON *v.* CALIFORNIA. Sup. Ct. Cal.;
No. 89–5737. COLEMAN *v.* SAFFLE, WARDEN, ET AL. C. A. 10th Cir.;
No. 89–6144. PREJEAN *v.* SMITH, WARDEN, ET AL. (two cases). Sup. Ct. La.;
No. 89–6148. PREJEAN *v.* SMITH, WARDEN. C. A. 5th Cir.;
No. 89–6302. WILLIAMS *v.* KEMP, WARDEN. C. A. 11th Cir.;
No. 89–6330. DICKERSON *v.* OHIO. Sup. Ct. Ohio;
No. 89–6694. GARDNER *v.* UTAH. Sup. Ct. Utah;
No. 89–6745. TARVER *v.* ALABAMA. Sup. Ct. Ala.; and
No. 89–7005. HARRIS *v.* TEXAS. Ct. Crim. App. Tex. Certiorari denied. Reported below: No. 88–7100, 40 Ohio St. 3d

301, 533 N. E. 2d 701; No. 89–5167, 873 F. 2d 249; No. 89–5277, 874 F. 2d 1385; No. 89–5331, 541 So. 2d 598; No. 89–5485, 544 So. 2d 184; No. 89–5686, 48 Cal. 3d 879, 771 P. 2d 1294; No. 89–5737, 869 F. 2d 1377; No. 89–6144, 550 So. 2d 639 (first case), 549 So. 2d 1237 (second case); No. 89–6148, 889 F. 2d 1391; No. 89–6302, 846 F. 2d 1276; No. 89–6330, 45 Ohio St. 3d 206, 543 N. E. 2d 1250; No. 89–6694, 789 P. 2d 273; No. 89–6745, 553 So. 2d 633; No. 89–7005, 784 S. W. 2d 5.

JUSTICE BRENNAN and JUSTICE MARSHALL, dissenting.

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg* v. *Georgia*, 428 U. S. 153, 227, 231 (1976), we would grant certiorari and vacate the death sentences in these cases.

No. 89–907. COUNTY OF LOS ANGELES ET AL. *v.* CABRALES. C. A. 9th Cir. Certiorari denied. JUSTICE WHITE and JUSTICE O'CONNOR would grant certiorari. Reported below: 886 F. 2d 235.

No. 89–948. BAILEY ET AL. *v.* ROBINSON, PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBINSON, ET AL. C. A. 6th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 883 F. 2d 75.

No. 89–1076. CORONA *v.* UNITED STATES. C. A. 11th Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 885 F. 2d 766.

No. 89–1156. BATH IRON WORKS CORP. ET AL. *v.* DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR. C. A. 1st Cir. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 885 F. 2d 983.

No. 89–1117. FIRST NATIONAL BANK OF BELLAIRE *v.* HUFFMAN INDEPENDENT SCHOOL DISTRICT ET AL. Ct. App. Tex., 14th Dist. Motion of Texas for leave to intervene granted. Certiorari denied. Reported below: 770 S. W. 2d 571.

No. 89–1277. SUPERIOR ROLL FORMING CO. ET AL. *v.* INTERROYAL CORP. C. A. 6th Cir. Motion of petitioners to place

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No. 89–1317. NATIONAL SHOPMEN PENSION FUND *v.* McDANIEL ET AL. C. A. 9th Cir. Motion of National Roofing Industry Pension Fund for leave to file a brief as *amicus curiae* granted. Certiorari denied. JUSTICE WHITE would grant certiorari. Reported below: 889 F. 2d 804.

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ings against respondent attorney for collecting fees from black lung benefits claimants in violation of Labor Department rules, and where court denied enforcement of a sanction on ground that Department's implementation of Act's restriction on fee payments violated due process, ethics committee had standing on basis of its classic interest as a government prosecuting agency arguing for validity of a law upon which its prosecution is based, and respondent had third-party standing by virtue of his claim that fee scheme's enforcement against him deprived his clients of a due process right to obtain legal representation. Department of Labor v. Triplett, p. 715.

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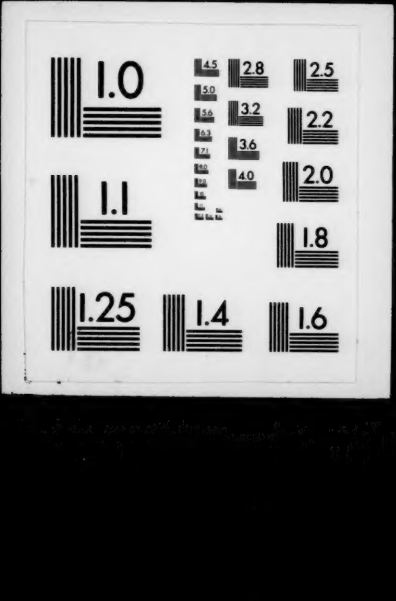
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